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In the Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DISTRICT OF COLUMBIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-125a) is reported at 521 F. 2d 971.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1975 (App. B, *infra*, 126a-128a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, upon a State's failure to adopt an implementation plan meeting the requirements of the Clean Air Act, the EPA Administrator has authority under the Act to require the State to inspect motor vehicles to assure that they are properly maintained to control airborne pollutants within the State.

2. Whether, if the EPA Administrator has such statutory authority, the Clean Air Act is in this respect a valid exercise of Congress' power under the Commerce Clause of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions and regulations are set forth in App. C, *infra*, 129a-159a.

STATEMENT

A. The Statutory Scheme

The relevant provisions of the Clean Air Act are summarized at pages 3-8 of our petition for a writ of certiorari in *Environmental Protection Agency* v. *Brown*, No. 75-909, which presents the same issues as this case. (We are serving a copy of our petition in that case upon respondents here.)[1]

[1] We are also sending respondents a copy of our petition for certiorari in *Environmental Protection Agency* v. *State of Maryland*, No. 75-960, since that petition raises the same issues.

Briefly, the Act requires the Administrator to promulgate standards for maximum concentrations of particular pollutants in the air (Section 109). The States must then develop plans to achieve and maintain these standards within each air quality control region in the State (Section 110(a)(1)). The Administrator reviews these state implementation plans for conformity to the statutory requirements designed to assure that they provide for effective enforcement of the concentration standards (Section 110(a)(2)). If the Administrator finds an implementation plan inadequate, he must promulgate an appropriate plan for the State (Section 110(c)). When the Administrator finds "any person"[2] in violation of any implementation plan, Section 113 of the Act authorizes him to undertake enforcement measures, including application to an appropriate district court for a temporary or permanent injunction.

B. The National Capital Region Transportation Control Plan

On January 28, 30 and 31, 1972, the States of Maryland and Virginia and the District of Columbia, respectively, submitted implementation plans for achieving and maintaining the national ambient air quality standards. 37 Fed. Reg. 10870, 10899, 10857. They did not include transportation control measures since the States had been advised by the Administrator that adoption of such measures could be de-

[2] "Person" is defined in Section 302(e) to include a "State, municipality, and political subdivision of a State."

ferred until February 15, 1973. 37 Fed. Reg. 10844, 10871. On May 31, 1972, the Administrator found the Maryland, Virginia and District of Columbia plans inadequate in several respects. 37 Fed. Reg. 10871, 10899, 10857. While revisions to these plans were under consideration, the United States Court of Appeals for the District of Columbia Circuit held that the Administrator had improperly permitted postponement of submission of the transportation control portions of state implementation plans beyond the statutory deadline of January 30, 1972. *National Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F. 2d 968. The court ordered the Administrator to rescind all previously granted extensions for the submission and implementation of transportation control measures and to require the States to submit appropriate measures by April 15, 1973. The court directed the Administrator to prepare and publish a plan as required by the Act if a State failed to submit such measures. 475 F. 2d at 970-971.

The Administrator accordingly notified the States of the requirement to submit transportation control plans. 38 Fed. Reg. 7323. Maryland, Virginia and the District of Columbia submitted transportation control plans for the National Capital Interstate Air Quality Control Region[3] to EPA during April and

[3] The National Capital Interstate Air Quality Control Region consists of Montgomery and Prince George's Counties in Maryland; Arlington, Fairfax, Loudoun and Prince William Counties and the Cities of Alexandria, Fairfax and Falls Church in Virginia; and the District of Columbia (App. A, *infra*, 4a, n. 1).

May of 1973, and the Administrator disapproved the plans on June 22, 1973. 38 Fed. Reg. 16556-16557, 16558-16559, 16563. Following the procedures required by the Act, the Administrator promulgated a substitute National Capital Transportation Control Plan on November 15 and December 6, 1973. 38 Fed. Reg. 31536, 33702-33731. The principal provision of this plan required each jurisdiction to establish a state-funded and state-operated program for the inspection and maintenance of motor vehicles in the National Capital area. 40 C.F.R. 52.490(c), 52.1089(c), 52.2441(c) (App. C, *infra*, 150a-151a, 153a-154a, 156a-157a). The substitute plan further required each jurisdiction (the District of Columbia, Maryland and Virginia) to submit "a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program," including the text of needed statutory proposals or regulations and documents identifying the sources and amount of funds for the program (40 C.F.R. 52.490(f), 52.1089(f), 52.2441(f)).

The EPA-promulgated plan also provided that Maryland, Virginia and the District of Columbia "shall establish a retrofit program to ensure that * * * all light-duty vehicles of model years prior to 1968 * * * are equipped with an appropriate vacuum spark advance disconnect retrofit device * * * that will reduce exhaust emissions of hydrocarbons and

carbon monoxide" (40 C.F.R. 52.496(c), 52.1094(c), 52.2447(c)). A similar retrofitting program was also required for all motor vehicles of model years 1971 through 1975 (40 C.F.R. 52.495(c), 52.1093 (c), 52.2446(c)), pre-1973 medium-duty vehicles (40 C.F.R. 52.492(c), 52.1091(c), 52.2444(c)), and heavy-duty vehicles (40 C.F.R. 52.494(c), 52.1092 (c), 52.2445(c)). Each of these regulations also required the States not to "register or allow to operate on its streets or highways any vehicle that does not comply" with the requirements of these programs, and to prohibit owners from operating vehicles that are not in compliance with the programs' requirements. 40 C.F.R. 52.492(e) and (f), 52.494-52.496(e) and (f), 52.1091-52.1094(e) and (f), 52.2444-52.2447(e) and (f).

Maryland, Virginia and the District of Columbia did not comply with the required schedule; instead, they petitioned the court of appeals for review of the Administrator's action pursuant to Section 307(b)(1) of the Clean Air Act, as amended, 84 Stat. 1708, 42 U.S.C. 1857h-5(b)(1).[4]

C. The Decision Below

The court held that the Clean Air Act did not authorize the Administrator to require the States to adopt legislation or regulations to establish a trans-

[4] Since the implementation plans involved the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit was the appropriate circuit court to review the Administrator's action in promulgating the plans. 42 U.S.C. 1857h-5(b)(1); App. A, *infra*, 8a, n. 6.

portation control program found necessary by EPA. Thus, if a State fails to submit an acceptable plan, the Administrator must promulgate the regulations to be applied within the State; he cannot compel the State to do so (App. A, *infra*, 20a-28a). But the court held that when such regulations have been promulgated, the Act authorizes the Administrator to require the States to enforce them. The court then considered the constitutionality of the Act as so interpreted, and concluded that a State could be required to enforce federal regulations designed to control pollution the State caused directly (*e.g.*, through operation of state-owned vehicles) or indirectly (*e.g.*, through allowing use of state roads by vehicles not conforming to federal requirements). Although the federal power extended to requiring the States to prohibit the use of state roads by vehicles that do not comply with federal standards, it could not constitutionally extend to requiring the State to inspect privately operated vehicles to assure that they comply with those standards (App. A, *infra*, 41a-49a).

In sum, the court concluded (App. A, *infra*, 48a-49a):

> The inspection and maintenance regulations and the retrofit regulations are invalid to the extent that they direct unconsenting states to enact regulations and thus go beyond the authority conferred by the Act, and in part because they require the states to administer and enforce federal regulatory programs and thus exceed constitutional power under the commerce clause. However, the commerce power does en-

able the federal government to prohibit the states from registering non-conforming vehicles and thus the provision to that effect in each regulation is constitutional.

Since the States could not be compelled to establish a program to identify non-conforming vehicles, the court remanded the case to the Administrator with directions that he "promulgate a complete and enforceable set of regulations establishing [such an inspection] program as promptly as possible" (App. A, *infra*, 49a).

REASONS FOR GRANTING THE WRIT

This case, like *Environmental Protection Agency* v. *Brown*, petition for a writ of certiorari pending, No. 75-909, and *Environmental Protection Agency* v. *State of Maryland*, petition for a writ of certiorari pending, No. 75-960, concerns the extent of the EPA Administrator's authority to promulgate pollution control plans for transportation systems regulated by the States, and to require the States to carry out such plans. The decision below limits that authority, and is thus in direct conflict with *Pennsylvania* v. *Environmental Protection Agency*, 500 F.2d 246 (C.A. 3). Moreover, as we pointed out in our petitions in *Brown* and *Maryland*, it is substantially inconsistent with the decisions in both of those cases.

The same statutory provisions are involved in each case; the considerations that bear upon their interpretation and constitutionality are accordingly identical. Therefore, as we explained in our *Brown* and

Maryland petitions, the existence of the conflict in the circuits concerning the Administrator's authority to implement an important federal program, and the significant constitutional issues concerning the relation between state and federal powers which underlie that conflict, merit plenary review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 74-1013, 74-1575 and 74-1579 to 74-1582

DISTRICT OF COLUMBIA, ETC., PETITIONER

v.

RUSSELL E. TRAIN, Administrator, Environmental Protection Agency and ENVIRONMENTAL PROTECTION AGENCY, ETC., RESPONDENTS

WASHINGTON AREA BICYCLIST ASSOCIATION, INC., METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, INC., BREATHERS FOR THE REDUCTION OF ATMOSPHERIC HAZARDS TO THE ENVIRONMENT, INTERVENORS

THE COUNTY OF PRINCE WILLIAM, VIRGINIA, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

STATE OF MARYLAND, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, and ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

CITY OF FAIRFAX, VIRGINIA,
a Municipal Corporation, PETITIONER

v.

RUSSELL E. TRAIN, Administrator and
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

CITY OF ALEXANDRIA,
a Municipal Corporation of Virginia, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, and
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

COMMONWEALTH OF VIRGINIA EX REL. STATE AIR
POLLUTION CONTROL BOARD, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, and
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Argued May 12, 1975

Decided Oct. 28, 1975

Petitions for Review of an Order of the Environmental Protection Agency.

John C. Salyer, Asst. Corp. Counsel for the District of Columbia, Washington, D. C., with whom C. Francis Murphy, Corp. Counsel, Louis P. Robbins, Principal Asst. Corp. Counsel, and David Eisenberg, Asst. Corp. Counsel, Washington, D. C., were on the brief for petitioner in No. 74-1013.

J. Thomas Steger, Asst. Atty. Gen., Commonwealth of Virginia for petitioner in No. 74-1582 also argued for petitioners in Nos. 74-1575, 74-1579, 74-1580 and 74-1581.

John S. Battle, Jr., and William H. King, Jr., Richmond, Va., were on the brief for petitioner in No. 74-1575.

Stephen M. Pratt, Fairfax, Va., was on the brief for petitioner in No. 74-1580. Thomas P. Dugan, Fairfax, Va., also entered an appearance for petitioner in No. 74-1580.

J. Howard Middleton, Jr., Alexandria, Va., was on the brief for petitioner in No. 74-1581.

Bruce J. Chasan, Atty., Dept. of Justice, with whom Wallace H. Johnson, Asst. Atty. Gen., Edmund B. Clark, Martin Green, Attys., Dept. of Justice, and Robert V. Zener, Gen. Counsel, E. P. A., were on the brief for respondent. Richard G. Stoll, Jr., Atty., E. P. A., also entered an appearance for respondent.

Joel D. Joseph, Washington, D. C., for intervenors in Nos. 74-1013 and 74-1579.

Before MacKINNON and ROBB, Circuit Judges, and CHRISTENSEN,* Senior United States District Judge for the District of Utah.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the court filed by Circuit Judge MacKINNON.

MacKINNON, Circuit Judge:

The State of Maryland, the Commonwealth of Virginia, the District of Columbia, the County of Prince William, Virginia, and the Cities of Alexandria and Fairfax, Virginia, petition this court for review of the action by the Administrator of the Environmental Protection Agency (EPA) in promulgating "transportation control" regulations to be included in the air quality implementation plans for the National Capital Interstate Air Quality Control Region.[1] 38 Fed. Reg. 33702 (Dec. 6, 1973). These regulations were adopted pursuant to section 110 of the Clean Air Act, 42 U.S.C. § 1857c-5. We affirm the regulations in part and remand the remainder to the EPA for revision and further proceedings in light of this opinion.

I. Background.

A. *The Statutory Scheme*

Under the regulatory scheme established by the Clean Air Act Amendments of 1970, 84 Stat. 1679, 42 U.S.C. § 1857 *et seq.*, the Administrator of the EPA was directed to promulgate national primary and secondary ambient air quality standards (section

[1] The National Capital Interstate Air Quality Control Region consists of Montgomery and Prince George Counties in Maryland; Arlington, Fairfax, Loudoun and Prince William Counties, and the cities of Alexandria, Fairfax and Falls Church in Virginia; and the District of Columbia.

109). The standards were promulgated at 36 Fed. Reg. 8186 (April 30, 1971). Each state[2] was then required to develop and submit for EPA approval by January 30, 1972, a plan for the implementation, maintenance and enforcement of these standards in each air quality control region within the state (section 110(a)(1)). The Administrator was directed to approve any state plan or portion thereof which satisfied the criteria enumerated in section 110(a)(2)(A)-(H) and disapprove the remainder.

If a state fails to submit a plan, submits an inadequate one, or fails to revise its plan when required, the Administrator is to publish proposed regulations which are to be promulgated as the implementation plan for the state within six months of the deadline for the state submission (section 110(c)). Thereafter the EPA-promulgated plan governs the regulation of air quality in that state. Under section 113, the EPA is authorized to enforce implementation plans through compliance orders, civil actions or criminal penalties. Although the statute calls for achieving the primary standard by May 31, 1975, it also provides for an extension of up to two years upon submission by the state of an application satisfying the requirements of section 110(e).

B. *The Development of a Transportation Control Plan for the National Capital Region*

Since automobile exhaust emissions are the chief source in the ambient air of three of the six pollut-

[2] Unless otherwise indicated, the term "state" includes the District of Columbia. See 42 U.S.C. § 1857h(d).

ants for which standards were issued (40 CFR, Part 50), the Administrator determined that in some areas, transportation control plans would be necessary to reduce concentrations of carbon monoxide, hydrocarbons and photochemical oxidants to acceptable levels. However, because of the lack of experience with such plans, the deadline for the states to submit them was extended to February 15, 1973. 87 Fed. Reg. 10842 (May 31, 1972). For the same reason, many states were given two year extensions of the deadline for attainment of the primary standards. On January 31, 1973, this court decided *NRDC* v. *EPA*, 154 U.S.App.D.C. 384, 475 F.2d 968 (1973), which held that the Clean Air Act did not permit either delay in the submission of transportation control plans or the granting of blanket extensions of the attainment date of mid-1977. The states were accordingly directed to submit transportation control strategies by April 15, 1973, designed to attain the national air quality standards by mid-1975.[3]

The various governmental units comprising the National Capital Region created an Air Quality Planning Committee to formulate a coordinated transportation control plan. Its recommendations were largely followed by the District of Columbia, Maryland and Virginia in the plans they submitted to the EPA during April and May, 1973. The plans included proposals for improved mass transit, parking disin-

[3] *See* 38 Fed. Reg. 30626-27 (Nov. 6, 1973) for a more extensive discussion of these developments.

centives, emission inspection programs, vehicle retrofit, control of gasoline evaporation during transfer, elimination of dry cleaning vapor losses, a ban on truck deliveries during certain hours, and aircraft taxiing emissions reductions. They were designed to bring about a 56 percent reduction in carbon monoxide emissions and a 67 percent rollback of hydrocarbon emissions.[4]

On June 15, 1973, the Administrator approved some portions and disapproved other portions of the Maryland, Virginia and District of Columbia plans, noting that they contained certain regulatory and enforcement deficiencies, including a failure of the jurisdictions to guarantee that their legislatures would adopt laws and approve appropriations necessary to carry out the proposed measures. 38 Fed. Reg. 16556-57, 16558-59, 16563 (June 22, 1973). After the jurisdictions submitted supplemental material to cure some deficiencies, the Administrator, acting pursuant to section 110(c), published a proposed plan for each of the three portions of the Region and scheduled the necessary public hearings thereon. 38 Fed.Reg. 20758, 20779, 20789 (Aug. 2, 1973). At the same time, EPA announced its determination that the primary ambient air quality standards could not be achieved in the Region before May 31, 1977,

[4] Hydrocarbons, combined with sunlight and nitrogen dioxide, form oxidants. Thus separate figures for reduction in photochemical oxidants are not given. The relationship between reduction of hydrocarbons and reduction of oxidants is shown by the graph in Appendix J of 40 C.F.R. § 51.

and accordingly proposed to give each jurisdiction a two-year extension pursuant to section 110. A "preamble" to the EPA's transportation control plan was promulgated on November 6, 1973, 38 Fed.Reg. 30626, and regulations for the preconstruction review of parking facilities were released a week later, 38 Fed.Reg. 31536 (Nov. 15, 1973). On December 6, 1973, the balance of the regulations in the National Capital transportation control plan were issued, including a two-year extension of the attainment dates for each jurisdiction.[5] 38 Fed.Reg. 33702-31. This plan was incorporated in essentially identical form into the implementation plans for each jurisdiction. 40 C.F.R. Part 52, Subparts J(D.C.), V(Maryland), and VV(Virginia). These regulations are set out as an Appendix to this opinion and form the basis for this appeal.[6]

C. *The Structure of the Transportation Control Regulations*

As promulgated, the EPA's plan imposes the following transportation control measures:

(1) A commitment to purchase 475 additional busses for the regional bus fleet by 1977, costs to

[5] 40 C.F.R. §§ 52.481, 52.1072(b), 52.2422(b).

[6] 42 U.S.C. § 1857h-5(b)(1) gives this court jurisdiction to entertain petitions for review of actions of the Administrator promulgating implementation plans covering any Region that includes the District of Columbia. Several of the instant petitions were initially filed in the Fourth Circuit and were transferred here pursuant to that court's order of June 4, 1974.

be spread over the three jurisdictions. (40 C.F.R. §§ 52.476(g), 52.1080(g), 52.2435(e));[7]

(2) The creation of reversible, exclusive express bus lanes on specified corridors within the Region by January 1, 1975. (40 C.F.R. §§ 52.476(h), 52.1080(h), 52.2435(f));

(3) The adoption of an inspection and maintenance program by each of the three jurisdictions, applicable to all vehicles registered in the Region except antiques. The initial inspection cycle is to be completed by January 1, 1976. Failed vehicles must be retested within two weeks, and the jurisdictions must also adopt a program of enforcement to prevent intentional readjustment subsequent to the inspection. (40 C.F.R. §§ 52.490, 52.1089, 52.2441);

(4) The creation of a network of at least 60 miles of bicycle lanes, built to EPA specifications, in each jurisdiction by July 1, 1976, and a requirement that all operators of automobile parking lots containing more than 50 spaces provide bicycle storage facilities. (40 C.F.R. §§ 52-.491, 52.1090, 52.2442);

(5) The retrofit of pre-1973 medium-duty vehicles, not required to be retrofitted with an oxidizing catalyst, with an Air/Fuel Control device. This is an unspecified system which is designed to increase the air/fuel ratio on which the engine operates and which must result in a 15 percent reduction in hydrocarbons and a 30 percent

[7] The citation of three successive sections of 40 C.F.R. Part 52 denotes the respective provisions of the District of Columbia, Maryland and Virginia implementation plans.

reduction in carbon monoxide emissions. The retrofit is to be completed by May 31, 1976. (40 C.F.R. §§ 52.492, 52.1091, 52.2444);

(6) The retrofit of all heavy-duty vehicles with an Air/Fuel Control device by May 31, 1977. This is the same type of system as in (5), but it must result in a 30 percent reduction in hydrocarbons and a 40 percent reduction in carbon monoxide emissions. (40 C.F.R. §§ 52.494, 52-.1092, 52.2446);

(7) The retrofit of light-duty fleet vehicles (taxis, etc.) and medium-duty vehicles of model years 1971 through 1975 with an oxidizing catalyst device. (40 C.F.R. §§ 52.495, 52.1093, 52-.2446). (The EPA states in its Brief, p. 41, that this regulation is being revoked in light of recent disclosures that catalytic converters emit sulphuric acid mists which may pose a significant health hazard);

(8) The retrofit of all pre-1968 light-duty vehicles (i.e. passenger cars) with a Vacuum Spark Advance Disconnect (VSAD) by January 1, 1976. This is an unspecified device that prevents the ignition vacuum advance from working at slow speeds or in low gear. It must produce at least 25 percent reduction in hydrocarbons and 9 percent reduction in carbon monoxide emissions. (40 C.F.R. §§ 52.496, 52.1094, 52.2447).

The plan originally contained provisions for parking surcharges,[8] elimination of free on-street commuter parking,[9] elimination of free employee parking [10] and the establishment of fees for federal parking facilities.[11] The surcharge regulations were subsequently revoked, 39 Fed.Reg. 1848 (Jan. 15, 1974), and Congress has since prohibited their use. See 42 U.S.C. § 1857c-5(c)(2)(B). While the others apparently have not yet been specifically revoked, the EPA concedes [12] that the regulations relating to employee parking and federal parking facilities fall within the definition of "parking surcharge regulation" in section 1857c-5(c)(2)(H)(i) and thus are void. The EPA rejected the state-proposed ban on deliveries by heavy-duty vehicles during certain hours in favor of a retrofit strategy because of enforcement problems and uncertainties in the amount of pollution abatement which would be achieved. Finally, the transportation control plans include gasoline vapor recovery regulations,[13] parking management regula-

[8] 40 C.F.R. §§ 52.476(d)(3), 52.1080(d)(3), 52.2435(b)(3).

[9] *Id.* §§ 52.476(e), 52.1080(e), 52.2435(c).

[10] *Id.* §§ 52.476(f), 52.1080(f), 52.2435(d).

[11] *Id.* §§ 52.486, 52.1085, 52.2437.

[12] EPA Brief at 32-33.

[13] 40 C.F.R. §§ 52.487, 52.488, 52.1086, 52.1087, 52.2438, 52.2439. The rulemaking with respect to the regulations for control of vapor emissions during vehicle refueling has been reopened, 39 Fed. Reg. 21049 (June 18, 1974), and compliance dates have been deferred until the EPA approves a test procedure for certification of vapor recovery devices. 40 Fed. Reg. 1126-27 (Jan. 6, 1975). This court has ordered consolidation of four petitions for review of these regulations and deferred their consideration. *Texaco, Inc.* v. *EPA*, No. 74-1016 and consolidated cases, order entered December 30, 1974.

tions [14] and provisions for the control of dry cleaning solvent evaporation [15] which are not challenged by the instant petitioners.

The vehicle inspection and retrofit regulations all follow the same basic pattern:

(a) Definitions.

(b) The regulation is made applicable to each state's portion of the National Capital Region.

(c) The state is ordered to establish a particular program and to submit a detailed compliance schedule containing the steps it will take to establish and enforce the program and the text of all proposed statutes and regulations needed for enforcement.

(d) By a set date, the state is ordered to submit legally adopted regulations establishing the program in compliance with EPA specifications.

(e) The state is prohibited from registering any non-conforming vehicle or allowing the operation of such vehicles on its streets and highways.

[14] 40 C.F.R. §§ 52.493, 52.1103, 52.2443. Section 510 of Pub. L. 93-563, 88 Stat. 1822 (Dec. 31, 1974) prohibited the EPA from expending any funds to regulate parking facilities until June 30, 1975, and thus effectively stayed implementation of these regulations. The EPA subsequently suspended the parking management regulations indefinitely pending promulgation of amendments, 40 Fed. Reg. 2585-86 (Jan. 14, 1975), and has since extended that suspension in light of legislation pending before Congress on the subject, 40 Fed. Reg. 29713 (July 15, 1975). These regulations are presently before this court for review in *Sears, Roebuck & Co.* v. *EPA*, No. 73-2234 and consolidated cases.

[15] 40 C.F.R. §§ 52.489, 52.1088, 52.2440.

(f) Vehicle owners are prohibited from operating or permitting the operation of non-conforming vehicles.

The express bus lane regulations consist of an order that the state construct such lanes along specified corridors according to EPA blueprint and a requirement for the submission of a compliance schedule. The bicycle lane/storage facilities regulations contain similar orders for the enactment of the program and the submission of a compliance schedule and legally adopted regulations. In addition, they require each state to conduct a comprehensive study of bicycle utilization and the feasibility of various designs. In the case of mandatory bus purchases to increase the regional bus fleet, each state is ordered to submit documents showing that the necessary financial commitments have been made by the state or by its local governments.

II.

[1] Virginia, Maryland and the local governments argue that the EPA regulations violate the principles of federalism embodied in the Tenth Amendment, that enforcement of the penalty provisions of the Clean Air Act against state officials would violate the constitutional guarantee of a republican form of government,[16] that enforcement against local officials

[16] *U.S. Const.*, art. IV, Sec. 4.

would unconstitutionally interfere with the authority of the state over its political subdivisions, and that the Clean Air Act does not authorize the EPA to require states to enact laws or enforce federally-imposed implementation plans. In addition, Virginia and Maryland assert that various portions of the EPA plan are arbitrary and capricious. The District of Columbia makes generally the same points, but it also argues that elimination of the parking surcharges has made the implementation plans insufficient to attain the air quality standards and therefore the entire regulatory scheme should be remanded to the EPA for reevaluation. In keeping with the general policy of federal courts that constitutional questions should be avoided if the case can be decided on statutory grounds, see *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-69, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947), we shall first consider petitioners' claim that the Clean Air Act does not authorize the EPA to require the states to enact laws or administer and enforce implementation plans.

A. *EPA Powers under the Clean Air Act*

The Clean Air Act places considerable emphasis on the role of the states in achieving the national air quality standards:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national

> primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 1857c-2(a). After the states have fulfilled this "responsibility" by submitting implementation plans for EPA approval, the Administrator is directed to disapprove those submissions to the extent that they fail to contain certain elements enumerated in section 110(a)(2). For purposes of this action, the relevant elements are subsection (B) of that section which requires that plans contain necessary emission limitations "including, but not limited to, . . . transportation controls;" subsection (F)(i) which requires plans to contain "necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan;" and subsection (G) which prevents approval of a state-submitted plan unless "it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards."

When he concluded that the Maryland, Virginia and District of Columbia plans were deficient in certain respects, the Administrator was required by section 110(c) to promulgate his own regulations which would be enforced as the "applicable implementation plans." However, he also believed that it would be inefficient and impractical for the federal government to assume the responsibility for enforcing the regulations he was promulgating. In addition he decided that direct federal enforcement was not the means

contemplated by the Act.[17] The Administrator's reasoning is set forth in detail in the general preamble to all the transportation control plans, 38 Fed.Reg. 30632-33 (Nov. 6, 1973).

The regulations ultimately issued by the Administrator are a carefully constructed device to get around the dilemma posed by his lack of means for forcing the states to submit adequate implementation plans under section 110(a)[18] and his reluctance to undertake enforcement of his own regulations. Exercising

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[17] Direct Federal enforcement and massive, duplicative Federal programs aimed at vehicles on an individual basis were not the means contemplated by the Act to solve these problems. It is clearly necessary that implementation of transportation control plans be carried out at the State and local level. The Chairman of the House Committee that reported out the amendments to the Act described their purpose as follows:

> If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore, the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the States, and we expect them to have the means to do the actual enforcing.
>
> Equally clear, however, is that the amendments of 1970 were designed to cure deficiencies that had resulted from total reliance upon state and local action to solve what was increasingly recognized as a national health problem. The regulations now being promulgated will provide the necessary assurance that such state and local action will be forthcoming.

38 Fed. Reg. 30633 (Nov. 6, 1973).

[18] *See* slip-page 281, —— U.S.App.D.C. ——, —— F.2d ——, *infra*.

his authority to promulgate implementation plans under section 110(c), he incorporated in each EPA plan requirements that the states adopt regulations establishing programs along EPA guidelines. Since he had shoved the responsibility for adopting regulations back onto the states, he also required them to conduct evaluations of the devices which would be installed under the retrofit programs and to conduct other studies which would be needed to form complete regulations and to establish an evidentiary basis to support the use of various transportation control strategies. Finally, he included provisions which will have the effect of requiring the states to use their agencies and personnel to administer the EPA programs and to appropriate state funds in amounts sufficient to carry out enforcement of the regulations which the EPA has promulgated.

Under this federal regulatory scheme, the failure of a state to enact or administer an EPA-imposed program has now become itself a violation of the implementation plan, and the state would supposedly be subject to enforcement proceedings under section 113 if it failed to comply. This enforcement by the EPA could include imposition of steep fines and imprisonment of recalcitrant state and municipal officials under section 113(c).[19] Petitioners argue that

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[19] The Administrator has stated to this court that these powers to compel state compliance with his directives will only be used as a last resort and that he will rely primarily on cooperative efforts.

> The Administrator does not intend to seek criminal penalties against a state legislature or governor pursuant to

the Clean Air Act does not confer upon the Administrator power to compel states to enact regulatory programs or to require that they administer and enforce applicable implementation plans. The latter issue will be the same whether the applicable plan has been adopted by the state or was promulgated by the Administrator.

[2] The Administrator's argument in support of his authority to promulgate the instant regulations is based primarily upon the fact that section 113 provides for federal enforcement of an "applicable

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section 113(c) of the Clean Air Act . . . . His first approach will be to obtain compliance by means of administrative orders pursuant to section 113(a)(1) . . . and administrative conferences pursuant section 113(a)(4) . . .

But if moral suasion should fail, it is clear that the Administrator has an adequate judicial remedy.

EPA Br. at 23-24. See also the Preamble to the transportation control plans:

> Under section 113(a)(1) and (2) of the Act, the Administrator is authorized to issue orders and to bring civil actions or seek penalties. Although the legal authority to enforce these plans is clear, the primary effort—as is true for all implementation plans—will be directed toward working with the States both to develop and to implement effective strategies. This effort should continue even after these measures have been promulgatd, so that all affected states eventually assume voluntarily the direct responsibility for enforcement of the plans.

38 Fed. Reg. 30633 (Nov. 6, 1973). We note, however, that the EPA has recently threatened to commence enforcement action against the District of Columbia government for failing to adopt an inspection program. *See* Exhibit A to the D.C. Reply Brief. Thus we believe that petitioners' claims are ripe for review.

implementation plan" against "any person" who is in violation of "any requirement of such plan." Section 302(e) of the Act provides:

> When used in this chapter—
>
> * * * *
>
> (e) the term "person" includes . . [a] State, municipality, and political subdivision of a State.

42 U.S.C. § 1857h(e). On the basis of this language, the Administrator reasoned as follows:

> The question remains, what kinds of requirements must a State or other governmental entity comply with? The most obvious situation is one in which a State is operating a direct stationary pollution source such as a municipal incinerator. It is no less clear, however, that the Act allows the control of many kinds of direct and indirect sources relating to mobile pollution. Parking and road facilities constitute such sources and the control of them is a valid exercise of the authority in section 110(a)(2)(B) and 110(c) to promulgate such regulations as may be necessary to attain the national ambient air quality standards.
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> * * * *
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> The Administrator is also promulgating regulations requiring that vehicles allowed to operate on public roads be inspected or "retrofitted" with emission control equipment. Use of public roads by large numbers of publicly registered and regulated vehicles without either proper maintenance or adequate control equipment also causes damage to health. The requirement that the road owners and the licensing and regulating au-

> thorities prohibit such use is a reasonable means of preventing such damage.

38 Fed.Reg. 30632-33 (Nov. 6, 1973). Such an interpretation by the officer primarily responsible for federal enforcement of the air quality standards is entitled to considerable deference. *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

[3-5] We agree with the Administrator that by including the states and their subdivisions within the definition of "person," Congress clearly intended that state-operated activities which are direct sources of air pollution would be subject to federal regulation the same as private pollution sources. Furthermore, the language in the statute is broad enough to include authority to require that the states conform their transportation systems to federal standards, e.g. by constructing exclusive bus lanes or expanding their bus fleets. However, an analysis of the language of the Act, and particularly of its enforcement provisions, does not appear to support the Administrator's claim that Congress intended to authorize him to regulate sources of pollution caused by the general public by requiring the states to enact statutes and to administer and enforce the programs contained in the EPA plan.

When a state fails to submit a plan or submits an inadequate one under section 110(a), the Administrator is directed by section 110(c) to "promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State. . . ." Under section 110(d), an "applicable

implementation plan" is "the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section [i.e., a state-submitted plan] or promulgated under subsection (c) of this section [i.e., a plan promulgated by the Administrator]. . . ." The federal enforcement procedures of section 113 are directed to correcting violations of the provisions of this "applicable implementation plan."

[6] Section 110(c) is in fact the Administrator's only recourse when he disapproves a state-submitted plan in whole or in part, or if the state fails to submit a plan, since the Act contains no enforcement mechanisms which could be used to force a reluctant state to adopt and submit an adequate plan under section 110(a). *See Plan for Arcadia* v. *Anita Associates*, 379 F.Supp. 311 (C.D.Cal. 1973), *aff'd*, 501 F.2d 390 (9th Cir. 1974):

> [T]here is no judicial remedy provided in the Act or elsewhere for the failure of the state to adopt and submit a plan. The only consequence of a state's failure to submit a plan is that the Administrator, then, has the duty to impose a plan upon the state, and no other remedy against the state exists.

379 F.Supp. at 314.

Of course, the Administrator's authority to promulgate a plan to replace an inadequate state plan means that he is not, as a practical matter, powerless to remedy deficiencies. In *NRDC* v. *EPA*, 478 F.2d 875 (1st Cir. 1973), the court rejected the Administra-

tor's protestations of helplessness and concluded instead:

> We hold that these statutory provisions not only empower, but also require, the Administrator to disapprove state statutes and regulations, or portions thereof, which are not in accordance with the requirements of the Clean Air Amendments. Congress plainly intended the federal statute and regulations promulgated thereunder to take precedence over state laws and regulations. By enabling the Administrator to insert his own regulations in a state plan, it provided him with the needed authority to substitute appropriate provisions for inappropriate ones. Thereafter, as legal components of the state plan, the Administrator's regulations may be both federally and locally enforced; violations thereof are violations of a state plan. § 1857c-8(a)(1); *see* §§ 1857c-7(d)(1), 1857c-9(b).

Id. at 888.

[7] In our opinion, the logical interpretation of the procedures established in section 110 is that Congress intended the regulations promulgated by the Administrator under section 110(c) to be the actual substantive regulations which would be enforced against sources of air pollution. We find nothing in the language of the Act which would indicate Congress felt that *state-adopted* regulations are essential to achieve the federal goal of regulating air pollution.[20] On the contrary, section 110(c) specifically

[20] We note that section 110(a)(2)(F)(i) requires state-submitted plans to provide "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plans" before they may be approved by the Administrator. However, the consequence of failing to provide such "assurances" is that the Administrator must promulgate a plan for that state under section 110(c). It does not follow that Congress believed that these "assurances" would be a necessary part of the Administrator's regulations. *See NRDC* v. *EPA*, 478 F.2d 875, 883-84 (1st Cir. 1973):

> [G]iven the mechanics of state-federal relations, it is difficult to imagine what sort of guarantee the current Rhode Island legislature could give the EPA to ensure that adequate resources would be devoted to the Plan. . . . Such assurances might have a symbolic effect; however, they would have little more, since a governor, or even a present session cannot make commitments on behalf of their successors, nor would such binding commitments seem to be enforceable.

contemplates that some states would fail to live up to their "responsibility." As the First Circuit indicated in *NRDC* v. *EPA*, *supra*, the Administrator's authority to substitute his own regulations gives him ample power to correct deficient state plans in those instances.

Had Congress intended to adopt the novel approach of empowering a federal agency to order unconsenting states to enact state statutes and regulations, thereby converting state legislatures into arms of the EPA, it most likely would have made that intent clear in the statute. It chose instead to adopt the quite unremarkable procedure of authorizing the promulgation of federal regulations to govern an area it believed to be subject to its commerce power, in those instances where state enactments did not meet federal

standards. The states were simply given an opportunity to bring their regulations into line within a specified time. Nothing in the Act suggests Congress saw any deficiency in its authority to regulate the subject of air pollution which would require it to utilize the device of regulating by ordering state and municipal governmental units to adopt regulations.

The enforcement provisions of the Act, contained in section 113, present further evidence that the Administrator's power over the states is not as extensive as he claims. Section 113(a)(1) enables him to bring federal enforcement procedures to bear on individual violations of an applicable implementation plan:

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

42 U.S.C. § 1857c-8(a)(1). This statute quite clearly contemplates that "the person in violation of the plan" and "the State in which the plan applies" may be two distinct entities. If Congress had expected that the states would be compelled, under pain of federal penalties, to enact and use their police power

to enforce the plan, there would have been little point in requiring that two notices be given. The most "efficient" enforcement from the standpoint of commitment of federal resources would be to order the state to take action against the violator and proceed against state officials under section 113(b) or (c) if they fail to act. Furthermore, this section clearly indicates that of the two parties who are given notice, enforcement via compliance order or civil action is to be directed against the "person in violation"—*i.e.*, the actual polluter, rather than the state.

Section 113(a)(2) authorizes the Administrator to take over direct federal enforcement of an implementation plan when he discovers widespread violations:

> Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—
>
> (A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

42 U.S.C. § 1857c-8(a)(2). Assuming the Administrator correctly determined that Congress intended to give him the power to force the states to administer air quality regulations, his power to assume federal enforcement under this subsection confers no enforcement authority not already available under subsection (1) unless one postulates a situation where the state is unable to comply with an enforcement order. This provision draws a clear distinction between "violations of an applicable implementation plan" and "a failure of the State in which the plan applies to enforce the plan effectively." Since widespread violations "result from" a state's failure to enforce a plan, the language strongly suggests Congress did not believe that inadequate state enforcement was, by itself, a "violation." Rather, the term "violation" must logically refer to the emission of pollutants into the air contrary to the provisions of an applicable implementation plan.

[8] The procedures to be followed by the Administrator in commencing the "period of federally assumed enforcement" are further evidence that Congress intended his powers over the states to be limited. Upon discovering widespread violations, he gives notice *to the state*. If he finds that the state's failure to enforce the plan effectively extends beyond 30 days after this first notice, the Administrator is directed to issue a *public notice* of that finding. The "period of federally assumed enforcement" commences

with this second notice. Had Congress intended that a state's failure to enforce the plan would be a "violation," a single notice would have sufficed as in subsection (1). Moreover, the fact that the second notice must be "public notice" indicates a congressional intent that the enforcement mechanisms which become available during the "period of federally assumed enforcement" (including the immediate possibility of daily fines, *see* section 113(c)(1)(A)(i)), are to be used by the Administrator against those guilty of emitting excess pollutants rather than against the state. Finally, the provision for terminating the federal enforcement period suggests that the statute contemplates the state's act of satisfying the Administrator "that it will enforce such plan" will be an act of voluntary cooperation rather than one made under the compulsion of a compliance order or civil action.

[9] In summary, we can find little in the language of the Act to indicate that the Administrator has been empowered to order that legislatures and municipal bodies in the states enact statutes and regulations or to bring federal enforcement actions against those governmental units to do so. Congress did not find it necessary to provide any means of directly forcing the states to comply with the mandate in section 110(a)(1) that they "shall" submit implementation plans. Under such circumstances the term is directory and not mandatory. Nor is there any basis in the Act to infer that Congress intended the Administrator to accomplish the identical result

indirectly through his power to promulgate his own regulations.

[10-12] By ordering the states to enact and submit regulations after their initial plans were found to be inadequate, rather than promulgating his own regulations directing [sic] controlling sources of air pollution, the Administrator has thus exceeded the authority conferred upon him by section 110(c) of the Clean Air Act. Also, to the extent that he has left to the states the preparation of regulations needed to implement the clean air standards, he has failed to perform his duty under section 110 to promulgate an "applicable implementation plan" which provides for the "attainment" and "maintenance" of those standards and which can be enforced against "violations" under section 113. Finally, insofar as the various studies of transportation control methods and evaluations of retrofit devices which the Administrator's regulations require the states to submit are necessary to fill in the details of the regulations and to create an evidentiary record supporting their adoption, the Administrator has further failed to meet his statutory responsibility under section 110(c).

[13] We therefore must vacate those portions of the instant regulations which order the states and municipalities to enact statutes and regulations or to take other actions, such as approving devices to be installed in vehicles, that are necessary in order to complete the regulatory scheme. Congress placed these duties on the Administrator, not the states when state-submitted plans are found to be insufficient. The particular regulations which are affected by this holding are parts of section (c) and all of section (d) of each retrofit regulation, portions of sections (c) and (f) of each inspection and maintenance regulation and sections (d), (e), (f) and (g) of the bicycle lanes and storage facilities regulations.[21] Since the regulations and studies which would have been supplied by the states under these provisions were necessary for the formation of a complete regulatory program, it will be necessary to remand them to the Administrator with directions that he promulgate a full set of transportation control regulations for the attainment of the air quality standards and insert them in place of the portions of each state's implementation plan which was found deficient.

[14] There remains one aspect of the inspection and retrofit regulations which has yet not been considered. Each regulation directs the state to affirmatively establish the particular program to assure the inspection or retrofit of each vehicle of a certain class registered in that state. Each also prohibits the state from registering any non-conforming vehicle or allow-

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[21] With respect to the bicycle lane regulations, the requirements that the states submit "comprehensive studies" of the need for and feasibility of the program and that they submit legally adopted regulations exceed the Administrator's authority under the Clean Air Act. The directive that the states require all operators of parking facilities to provide bicycle storage areas must also be invalidated as in excess of the Administrator's authority. Of course, this latter defect could be corrected simply by addressing his orders directly to the operators of such facilities.

ing such vehicles to operate on its streets and highways. Arguably there is a difference between ordering the states to adopt a particular statute and ordering them to enforce a federal regulation against vehicles which they register. In other words, even though the states may not be compelled to enact statutes to fill in the details of the Administrator's regulations, it may be argued that they can be ordered to take actions which implement the federally imposed regulations. While as a practical matter the states may have to enact auxiliary statutes or state regulations to carry out the federal regulation, the latter approach would not be directly contrary to the requirement in section 110(c) that the Administrator, and not the states, promulgate the substitute regulations when state-submitted plans are found to be inadequate.

[15] As discussed above, the specific language of the Act suggests that Congress did not confer such authority any more than it intended that the states would be ordered to adopt statutes. On the other hand, nowhere in the Act is the Administrator specifically told that he lacks authority to force the states to administer the plans he has promulgated when the plan is directed to a traditional state function such as registering and licensing motor vehicles. At least in the case of inspection and maintenance programs, it is apparent from the legislative history that Congress did intend that the states would be required to cooperate in administering a federal air quality program.

Section 110(a)(2)(G) requires that each state plan provide "to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards" before it can meet with EPA approval. The House Report on the bill stated:

> [T]he legislation provides that *States must require inspection of motor vehicles* in actual use if the . . . [Administrator], after consultation with the State, determines that the achievement of ambient air quality standards requires such inspection and that such inspection is technologically and economically feasible.

H.Rep. No. 91-1146, 91st Cong., 2d Sess. 3-4 (June 3, 1970), U.S.Code Cong. & Admin.News 1970, pp. 5356, 5359 (emphasis added). The Senate Report contains similar language:

> The implementation plan section of the proposed bill would specifically provide that, to the extent necessary, *each region develop* motor vehicle inspection and testing programs for which it is eligible to receive assistance under Section 208 [now 210] of the proposed bill. The Committee believes that this is an extremely important provision. . . . It is also a class of air pollution sources for which the regions and the States have better opportunities to control.

S.Rep. No. 91-1196, 91st Cong., 2d Sess. 13 (Sept. 17, 1970) (emphasis added). As the court noted in *Pennsylvania* v. *EPA*, 500 F.2d 246, 258 (3d Cir. 1974), if Congress intended to require the states to establish inspection programs, it possibly would have

no objection to the states also being forced to administer other EPA-imposed programs. There were in fact certain statements made during the course of congressional debate which suggest an intent to confer this broader power. For example, Congressman Staggers, the Committee Chairman and floor manager of the bill in the House, stated:

> If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore, the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the states, and *we expect them to have the means to do the actual enforcing.*

116 Cong.Rec. 19204 (June 10, 1970) (Emphasis added).[22]

As we have seen, the actual language of the Act does not in every instance necessarily support these broad assertions in the legislative history. However, since the Act itself does not specifically reject the Administrator's claim of power to force the states to administer EPA-promulgated transportation con-

[22] *See also* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 14 (Sept. 17, 1970) ("The States would be expected to act to improve used vehicle performance."); 116 Cong. Rec. 32903 (Sept. 21, 1970) (Sen. Muskie) ("In Title I of this act we have written a national deadline for the purpose of implementing applicable ambient air quality standards. This is going to require every State Governor and the mayor of every city in this country to impose strict controls on the use of automobiles before the new car is a clean one.").

trol programs, we shall consider the question of whether Congress may constitutionally regulate the states in this manner.

B. *The Permissible Extent of Congressional Regulation of State Activities under the Commerce Clause*

[16, 17] None of the petitioners challenge the congressional determination that air pollution has a substantial effect on interstate commerce and therefore may be regulated by the federal government under the commerce clause. There is judicial precedent for upholding this exercise of federal jurisdiction. *See, e.g., South Terminal Corp.* v. *EPA*, 504 F.2d 646, 677 (1st Cir. 1974); *Pennsylvania* v. *EPA*, 500 F.2d 246, 259 (3d Cir. 1974). With respect to transportation controls, the federal government thus clearly has the power to direct owners of motor vehicles to install emission control devices and maintain them in proper adjustment.

[18] It is equally clear that an activity is not exempted from federal commerce power regulation simply because it is owned or operated by a state, and this is true whether the function being regulated is characterized as "governmental" or "proprietary." The principal authority on this issue is *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), which held that the wages of employees at state-operated schools and hospitals are properly subject to regulation under the minimum wage and maximum hour provisions of the federal Fair Labor

Standards Act. Rejecting an argument that the federal commerce power must yield when the state is performing a governmental function, the Court declared:

> [I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as "governmental" or "proprietary" in character. As long ago as *Sanitary District* v. *United States*, 266 U.S. 405 [45 S.Ct. 176, 69 L.Ed. 352], the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce.

392 U.S. at 195-96, 88 S.Ct. at 2023. The Court then turned to the question of whether the particular statute was "an otherwise valid regulation of commerce," and concluded:

> This court has always recognized that the power to regulate commerce, though broad indeed, has limits. . .
>
> > But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.

Id. at 196-97, 88 S.Ct. at 2024. See also *Parden* v. *Terminal Railway*, 377 U.S. 184, 84 S.Ct. 1207, 12

L.Ed.2d 233 (1964), and *United States* v. *California*, 297 U.S. 175, 183-85, 56 S.Ct. 421, 80 L.Ed. 567 (1936), both upholding federal regulations as applied to state-owned railroads; *Board of Trustees* v. *United States*, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025 (1933), which required a state university to pay federal customs duties on imported equipment; and *Sanitary District* v. *United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925). In its most recent decision in this area, *Fry* v. *United States*, —— U.S. ——, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975), the Court upheld, on the basis of *Wirtz*, the application of federal wage control regulations to the wages of all state employees.[23]

[19, 20] Once Congress has properly determined that the emission of pollutants into the air has an effect on interstate commerce, it has power to regulate activities which generate that pollution either directly or indirectly, and it is irrelevant that a particular source of pollution is operated by the state. Moreover, where federal regulations duly adopted pursuant to the commerce power come into conflict with state practices and regulations, the federal regulations must prevail under the Supremacy Clause. *See*

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[23] The Supreme Court has recently scheduled reargument in a case involving the application of the Fair Labor Standards Act to all non-supervisory state and municipal employees, including police and firemen. *National League of Cities* v. *Brennan*, (D.D.C., Dec. 31, 1974, Civ. No. 74-1812) (three-judge court), *probable jurisdiction noted*, 420 U.S. 906, 95 S.Ct. 823, 42 L.Ed.2d 835, *reargument scheduled*, —— U.S. ——, 95 S.Ct. 1988, 44 L.Ed.2d 475 (1975).

Fry v. *United States, supra*, — —U.S. —— at ——, 95 S.Ct. 1792 (1975); *Public Utilities Comm'n* v. *United States*, 355 U.S. 534, 544, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958).

[21, 22] In light of the foregoing decisions, it is possible to determine that certain of the Administrator's regulations are valid exercises of the federal commerce power. Where a state is directly operating the source of air pollution, *e.g.*, a state-owned fleet of automobiles, Congress has quite properly required that it conform to EPA regulations. The provisions requiring construction of exclusive bus lanes and purchases of additional buses arise from the regulation of "indirect" sources. The streets and highways and bus systems of the states are not being regulated by the Administrator as direct emitters of pollution but rather as factors which influence the use of pollution sources by other parties. We believe that these state-owned transportation systems are analogous to the railroad operated by the state in *United States* v. *California, supra*. This situation is similar to federal statutes passed in the 1890's requiring the railroads to operate safe trains. 45 U.S.C. § 1 *et seq.* Acting under its commerce power, the federal government thus can order the states to operate their transportation systems in accordance with federal regulations designed to protect the health of the nation's citizens by requiring them to purchase buses and construct exclusive bus lanes. Obviously this may be financially burdensome, but "when Congress does act [under the commerce power], it may place new or even enormous

fiscal burdens on the States." *Employees of the Department of Public Health and Welfare* v. *Department of Public Health and Welfare*, 411 U.S. 279, 284, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251 (1973).

We have somewhat more difficulty with the requirement that the states construct a system of bicycle lanes, since this requires construction of an additional separate transportation system rather than simply modifications to those presently in operation. However, since we set aside the regulations relating to bicycle lanes and storage facilities in Part III, D, *infra*, on the ground that they were not supported by adequate evidence in the record, there is no need for further discussion of their constitutionality at this time.

[23-26] The inspection and maintenance regulations and the retrofit regulations involve a regulatory approach of a quite different nature. The activity that is the actual target of the federal commerce power in this case is the operation of vehicles which are not properly equipped or maintained. Obviously the responsible parties here are the actual owners and operators of such vehicles, and the Administrator has properly included in each regulation a provision which prohibits them from operating non-conforming vehicles. However, each federally-promulgated regulation includes provisions ordering the states to enact statutes and to establish and administer programs to force their citizens to comply with this federal directive. Petitioners argue that this involves an intrusion into state sovereignty far beyond the regulations

approved in *Wirtz* and *California* since the federal government is here requiring that the states regulate interstate commerce and thus would be appropriating state legislative and regulatory power to be used to accomplish a federal regulatory objection.[24]

The Administrator began his analysis of the federal power to regulate the states by observing that they have contributed to air pollution by adopting certain transportation policies which encourage the use of motor vehicles.[25] As we have indicated, he correctly

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[24] Petitioners also challenging the constitutionality of section 113(c) insofar as it permits the imposition of penalties upon a state or its officials for failing to comply with the provisions of an EPA-promulgated implementation plan. However, to the extent that the state is subject to federal regulation under the commerce power, it will also be subject to the penalties provided for violation of those regulations. *Parden* v. *Terminal Railway*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964); *United States* v. *California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936). The Eleventh Amendment is of course no bar to enforcement actions brought by the federal government. It is clear that local government units may be required to comply with valid federal commerce regulations even when such action is inconsistent with or contrary to state policies. *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 168-72, 66 S.Ct. 906, 90 L.Ed. 1143 (1946); *Washington Dept. of Game* v. *FPC*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936, 74 S.Ct. 626, 98 L.Ed. 1087 (1954). However, the federal government will be able to order the subdivisions of the states to enact, administer and enforce federal regulatory programs only to the extent that it possesses the same power over the states.

[25] By building and maintaining roads and highways, by licensing vehicles and operators, by providing a system of traffic laws, and in many other ways, government has encouraged the growth of automobile use to its present

determined that the federal government could order the states to modify their transportation systems to correct this problem by constructing bus lanes and purchasing additional buses. Turning to his promulgation of inspection and retrofit regulations, he gave two justifications for requiring the states to enact and enforce these regulations. First, "[d]irect Federal enforcement and massive, duplicative Federal programs aimed at vehicles on an individual basis were not the means contemplated by the Act to solve these problems." 38 Fed.Reg. 30633 (Nov. 6, 1973). Second, he concluded "that the amendments of 1970 were designed to cure deficiencies that had resulted from total reliance upon state and local action to solve what was increasingly recognized as a national health problem." *Id.*

In *Pennsylvania* v. *EPA*, 500 F.2d 246) 3d Cir. 1974), the Third Circuit upheld the Administrator's power to direct the states to administer federally promulgated regulations, concluding:

> levels. There is nothing inevitable about such a choice. Governments could equally well have chosen to discharge their basic function of maintaining a transportation system in ways that would have discouraged the use of single-passenger automobiles, and encouraged the use of mass transit. But often they have not.

38 Fed. Reg. 30632 (Nov. 6, 1973). If responsibility for correcting air pollution problems arising from the operation of a regional system of streets and highways is to be assigned on the basis of the extent to which each jurisdiction has encouraged the use of automobiles, we would note that the federal government with its massive appropriations for highway construction bears a significantly higher portion of the blame than the Administrator's statements acknowledge.

In enacting the Clean Air Amendments of 1970, Congress created an interlocking governmental structure in which the Federal Government and the states would cooperate to reach the primary goal of the Act—the attainment of national ambient air quality standards. Under its provisions, state and local governments retain responsibility for the basic design and implementation of air pollution strategies, subject to approval and, if necessary, *enforcement by the Administrator*. We believe that this approach represents a valid adaption of federalist principles to the need for increased federal involvement. The only alternative implementation would be for the Federal Government to assume some of the functions of traffic control and vehicle registration and directly enforce the programs contained in the various transportation control plans. The Administrator has determined that this would not be a practicable way of attaining national air quality standards . . . and we fail to see how this would represent less of an intrusion upon state sovereignty.

Id. at 262-63 (emphasis added).

[27] While we have previously held that the Clean Air Act does not empower the Administrator to order non-consenting states to enact statutes or regulations in those areas where it is his duty to promulgate regulations, we have yet to consider the validity of those provisions which provide that the "State shall not register or allow to operate on its streets or highways any [non-complying] vehicle[s]." Is this regulation within the commerce power? In

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), Chief Justice Marshall laid the ground-work for answering this question when he stated that the power granted by the commerce clause was a

> . . . power to *regulate*; that is, to prescribe the rule by which commerce is to be governed.

22 U.S. (9 Wheat.) at 196 (emphasis added). In the provision prohibiting the licensing or use of non-complying vehicles, it is our opinion that the Administrator, acting pursuant to Congressional authority, has merely prescribed a rule by which commerce on state streets and highways is to be governed. Thus, we find the restraints on vehicle registration to be valid. In doing so, as we noted previously, there is a similarity to the longstanding Federal Safety Appliance Act which prohibits use of unsafe equipment on railroads. 45 U.S.C. § 1 *et seq.* Also, the federal regulation is directly related to existing activities presently being carried on by the states, and it does not specify the manner in which the state is to comply. A state may comply with the prohibition on registering non-conforming vehicles merely by requiring applicants for vehicle registration to submit a certificate of compliance obtained from federal officials or from private sources not manned by state personnel.

[28, 29] Beyond that, we draw the line and hold that the Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator. For example, the

attempt to require the state to "establish" each of the retrofit programs and to "evaluate and approve devices for use in this program," contained in section (c) of each retrofit regulation, is an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation. If the federal government wants to impose a program under federal authority, it is limited by the restrictions applicable thereto.

Actually, in extending the commerce power to the tremendous limits it has been pressed in recent years, the Congress and the Courts are most probably exceeding the intent of those who wrote the Constitution. In an 1829 letter, James Madison wrote to J. C. Cabell as follows:

> For a like reason, I made no reference to the "power to regulate commerce among the several States." I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it, which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which

> alone, however, the remedial power could be lodged.

3 *M. Farrand, Records of the Federal Convention* 478 (rev. ed. 1966), *quoting from IV Letters and other Writings of James Madison* 14-15. There is no question that the commerce power is here being used not as a "preventive provision against injustice among the States . . . [but] as a power . . . for the positive purposes of the General Government." We recognize the extent to which the Supreme Court has expanded the federal commerce power, but we are not willing to expand it beyond the limits that Congress specified or court decisions presently require.

In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles. The situation is not too dissimilar from one that would have existed during Prohibition if the Federal Government had sought to compel police officers in a wet state to enforce the federal laws on that subject. Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.

[30, 31] What is really needed to accomplish the federal objective in this situation is state cooperation in the administration of a federal regulatory program, and Congress has available numerous means of obtaining that cooperation.[26] However, where cooperation is not forthcoming, we believe that the recourse contemplated by the commerce clause is direct federal regulation of the offending activity and not coerced state policing of the details of an intricate federal plan under threat of federal enforcement proceedings. We therefore conclude that the inspection and retrofit regulations are invalid to the extent they require unconsenting states to administer and enforce the EPA-promulgated transportation control programs other than by a mere refusal to license noncomplying cars.

Petitioners attack the constitutionality of the instant regulations by arguing that they violate the protection accorded state sovereignty by the Tenth Amendment, which provides:

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[26] The federal government traditionally obtains state cooperation and participation in federal regulatory programs by offering the states a sufficiently attractive incentive or by threatening to withdraw a federal benefit they are presently receiving. A recent example of both approaches is the Emergency Highway Energy Conservation Act, Pub.L. 93-239, 87 Stat. 1046 (Jan. 2, 1974). Section 2 of that Act conditions the receipt of federal highway aid funds upon each state establishing a 55 miles per hour maximum speed limit upon the public highways within its jurisdiction. Section 3 made available to the states 90 percent federal funding for approved demonstration projects designed to encourage the use of car pools in urban areas.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Although this amendment does not on its face purport to place any limitation on the exercise of powers delegated to the federal government by the commerce clause, the Supreme Court recently observed that it does have some substantive meaning:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States* v. *Darby*, 312 U.S. 100, 124 [61 S.Ct. 451, 462, 85 L.Ed. 609] (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

Fry v. *United States*, —— U.S. at —— n. 7, 95 S.Ct. at 1795 n. 7. After considering the statute under review in that case, the Court concluded that "we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty." *Id.*

The Court has not yet made clear exactly what sort of restraints the Tenth Amendment does place on federal action under the commerce clause. *Wirtz* explicitly rejected "the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U.S. at 195-96, 88 S.Ct. at 2023. It re-

lied instead on the limits inherent in the commerce power as giving the Court "ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.'" *Id.* at 196, 88 S.Ct. at 2024. On the other hand, before commencing its discussion of the commerce power, the Court observed that the statute under review did not significantly intrude upon state powers:

> The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. Congress has "interfered with" these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals.

Id. at 193-94. In *Pennsylvania* v. *EPA*, *supra*, the Third Circuit discounted the relevance of this latter statement:

> Although the Court noted that under the facts of the case, there did not appear to be an interference with "sovereign state functions," it stated that in any case it is inappropriate to pose the issue in this way, since any exercise by the Federal Government of its delegated powers will necessarily "interfere" with the power of the states.

500 F.2d at 259-60. However, when the Supreme Court itself interpreted *Wirtz* in *Fry* v. *United States*, *supra*, it stated:

> We noted, moreover, that the statute at issue in *Wirtz* was quite limited in application. The federal regulation in this case is even less intrusive.

—— U.S. at ——, 95 S.Ct. at 1796.

[32] It would thus appear that the extent of federal intrusion into state sovereignty is of some relevance even where the federal regulations are an exercise of the commerce power. Since the Tenth Amendment was described in *Fry* as declaring "the constitutional policy that Congress may not exercise power *in a fashion* that impairs the States' integrity or their ability to function in a federal system," the restrictions may be directed to the manner in which the federal government exercises its commerce power. In other words, the Tenth Amendment may prevent Congress from selecting methods of regulating which are "drastic" invasions of state sovereignty where less intrusive approaches are available. If this is the case, the mere fact that direct federal regulation of vehicles would be less "efficient" would not appear sufficient to override the serious intrusion on state sovereignty involved in forcing the states to supplant federal officials in policing the details of federal regulations.

[33] However the Supreme Court ultimately determines to reconcile the formulation of the Tenth Amendment in *Fry* with the federal commerce power, we have no doubt that the inspection and retrofit regulations involve "drastic" intrusions on state sovereignty. A federal regulation which compels the states to enforce federal regulatory programs clearly "impairs the States' integrity" and "their ability to function in a federal system." [27] The Tenth Amendment thus provides an additional ground for striking down these particular regulations.

To summarize our holdings in this part, the exclusive bus lane regulations and the bus fleet regulations are valid federal regulations of state activities which affect commerce, under *United States* v. *California*, *supra*. The inspection and maintenance regulations and the retrofit regulations are invalid to the extent that they direct unconsenting states to enact regulations and thus go beyond the authority conferred by the Act, and in part because they require the states

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[27] We do not agree with the statement in *Pennsylvania* v. *EPA* 500 F.2d 246 (3d Cir. 1974), that direct federal enforcement of the retrofit and inspection programs would not "represent less of an intrusion upon state sovereignty." *Id.* at 263. The principle at work here is not that the states have an interest in keeping the federal government from regulating vehicles owned by their citizens but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive. Since the federal government acts under its commerce power when it enforces its own regulations against vehicle owners, direct federal regulation by definition involves no intrusion on state sovereignty whatsoever.

to administer and enforce federal regulatory programs and thus exceed constitutional power under the commerce clause. However, the commerce power does enable the federal government to prohibit the states from registering non-conforming vehicles and thus the provision to that effect in each regulation is constitutional.

At this point, the inspection and retrofit regulations consist of provisions which prohibit vehicle owners from operating vehicles that do not comply with applicable standards and prohibit the states from registering such vehicles. Although these requirements are valid exercises of the federal commerce power, and would by themselves suffice to establish each federal program, our holding that unconsenting states cannot be required to administer these federally-promulgated programs means that at present the regulations contain no method for determining which retrofit devices are approved for installation and what the applicable emission standards are. It is therefore necessary to remand the entire inspection and retrofit regulations for the National Capital Region to the Administrator with directions that he promulgate a complete and enforceable set of regulations establishing each program as promptly as possible and incorporate these in the implementation plans for this area.

[34, 35] There is one further matter which requires some comment. The foregoing discussion has not attempted to draw any distinction between the regulations promulgated for the District of Columbia

and those covering the States of Maryland and Virginia. As a federal entity, the District is obviously in a somewhat different status than the states with regard to the extent of control Congress can assert over its affairs and does not enjoy the independent protections afforded to the states because of their sovereign status. However, the Clean Air Act treats it as a state for purposes of developing implementation plans. See 42 U.S.C. § 1857h(d). Furthermore, the Administrator has placed considerable emphasis on assuring that the transportation control programs are applied uniformly throughout the National Capital Region.[28] To preserve this approach, we shall accordingly vacate the District of Columbia portions of the regulations to the same extent as the Maryland and Virginia regulations have been determined to be invalid. If the concept of regional uniformity of regulation is to be abandoned, that determination is for the Administrator in the first instance.

III.

[36] As each of the regulations under review has been upheld to some extent, we shall next consider the other challenges raised by petitioners. The applicable

[28] It must be emphasized that, in order to be effective, each VMT [vehicle miles traveled] control measure proposed or adopted by the District of Columbia must be reflected by identical or equivalent measures in the neighboring jurisdictions of Maryland and Virginia for their portions of the National Capital Interstate Region.

38 Fed. Reg. 20758 (Aug. 2, 1973). *See also* 42 U.S.C. §§ 1857c-1, 1857c-2.

standard for review of the Administrator's action in promulgating the various regulations which comprise the National Capital plan is the "arbitrary and capricious" standard of the Administrative Procedure Act.[29] *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 655 (1st Cir. 1974). Under this test, the petitioners challenge the validity of the regulations for VSAD retrofit, retrofit of medium- and heavy-duty vehicles, development of exclusive bus lanes and construction of bicycle lanes.

A. *VSAD Retrofit* According to the EPA, the retrofit of all pre-1968 vehicles with a VSAD device will cost $20.00 per unit[30] and will contribute 0.9 percent of the total reduction in emissions needed to reach the national standards.[31] Petitioners base their opposition to this regulation on a balancing of the very small reduction in pollution against the cost to the public. By the time the regulation is fully implemented in 1976, most of the vehicles involved would have only a short period of useful life remaining. The District of Columbia asserts that these older cars tend to be owned by poorer persons who can least afford the cost of the retrofit. In addition, installation of a VSAD device causes a small drop in fuel economy.[32] Finally, the 0.9 percent figure assumes that

[29] 5 U.S.C. § 706(2)(A).

[30] 38 Fed. Reg. 33709 (Dec. 6, 1973).

[31] *Id.* at 33708.

[32] EPA White Paper on Transportation Controls 5-6 (August 1973), Jt. App. at 329-30.

all vehicles will be retrofitted, but the regulations permit the exemption of any car for which no such device is available. Thus the actual reduction in emissions could be considerably less than predicted.

[37] The EPA's response is that economic and sociological considerations are either subordinate or irrelevant where the public health is concerned, citing *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 675 (1st Cir. 1974); *NRDC* v. *EPA*, 489 F.2d 390, 411-12 (5th Cir. 1974). We have no occasion to consider this argument, however, since we do not believe the reduction in pollution to be obtained by this retrofit has been shown to be so minimal that it can be said with confidence that adopting this strategy was arbitrary and capricious. The Administrator determined that these retrofits were needed in order to achieve the overall reduction in emissions required to attain the national standards in this Region, and we find no basis for holding that this determination was clearly wrong.

[38] Maryland and Virginia also contend that the retrofit regulations in general are arbitrary and unreasonable because the states are unable to determine what retrofit devices are practicable and approvable. They argue that instead there must be a single, uniform program of evaluating such devices. In light of our prior holding that the Act requires the Administrator to adopt complete regulations, including specification of approved devices, rather than leaving the job of supplying the details to the states, this argu-

ment has been mooted.[33] Further, we note that the EPA has already taken steps to establish a retrofit device evaluation program of its own. 40 Fed. Reg. 3495-3507 (Jan. 22, 1975).

B. *Medium- and Heavy-Duty Vehicle Retrofit* The attack by Maryland and Virginia on these regulations is based on the lack of certain information which is claimed to be needed to promulgate meaningful regulations, and particularly on the lack of data relating to the baseline emission for trucks. The availability of this data allegedly would enable one to distinguish between a "clean" and a "dirty" truck and require that emissions from the latter be reduced by an appropriate amount. In its absence, the states argue that owners of "clean" trucks will be required to spend money to make them cleaner while the same percentage reduction for "dirty" trucks will still allow them to emit excessive pollution.

[39] The Administrator, however, has chosen to require that all truck owners install devices which have been determined to produce a fixed percentage reduction in pollutants emitted. Under this approach, the data petitioners seek is simply irrelevant. In light of the problems which would be involved in tailoring the regulations to the different types of vehicles and

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[33] Even if we had held that the Administrator possesses power to compel the states to evaluate retrofit devices, we would have grave doubts about the reasonableness of a regulation which permitted each jurisdiction to conduct independent evaluations and possibly adopt different retrofit devices for installation in each portion of the National Capital Region.

to all possible operating conditions, we cannot say that the Administrator's choice of tactics is arbitrary or unreasonable.

Petitioners also argue that the regulations should be remanded to the Administrator "for an extension of implementation dates" in order to enable consideration of evaluation data being developed in a New York study of truck emissions. We note that the monthly report on that study, submitted as Addendum B to the EPA Brief, indicates that certain retrofit devices are available which will reduce emissions by the required amounts. In any event, neither this court nor the Administrator has authority to extend the implementation deadline beyond 1977. If the states are seeking an extension of interim compliance dates, they may do so by petitioning the Administrator under section 110(f) of the Act.

[40] C. *Exclusive Bus Lanes* The District of Columbia objects to the Administrator's refusal to grant its request for a delay in the implementation dates for establishment of exclusive bus corridors based on various funding and planning difficulties. In rejecting the request, the Administrator stated that it had not been adequately justified because exclusive bus lanes can be easily implemented but that "EPA will consider limited extension requests warranted by the specific facts." Jt.App. 507. While he has been somewhat insensitive to the problems his regulations have caused the various jurisdictions, we do not believe the Administrator acted arbitrarily in denying this particular request for extension.

[41] D. *Bicycle Lanes/Storage Facilities* The original notices of proposed rulemaking on the implementation plans made no mention of a possible promulgation of bicycle regulations. Instead, the impetus for these regulations came from testimony given at the hearings by area bicycle enthusiasts. Petitioners argue that these regulations are invalid because the Administrator failed to comply with the notice and hearing requirements of section 110(c) and 5 U.S.C. § 553(b) prior to promulgating them. However, the original notices stated that alternate forms of transportation controls would be considered at the hearings, and thus they were sufficient to give the parties notice that the agency might rely on comments tendered at the hearing in promulgating regulations, as it is allowed to do. *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 659 (1st Cir. 1974); *International Harvester Co.* v. *Ruckelshaus*, 155 U.S.App.D.C. 411, 478 F.2d 615, 632 n. 51 (1973). Furthermore, the EPA afforded the interested parties an opportunity to submit comments after the regulations were promulgated, but there was no attack made at that time nor was there any request for additional hearings. Thus petitioners' claims that these regulations suffer from a procedural defect are without merit.

[42, 43] The only evidence in this record indicating a need for bicycle regulations and establishing the connection between these regulations and a reduction in air pollution consists of the testimony at the hearing and a study of potential bicycle utilization in Philadelphia which the EPA later announced justified

its regulations.[34] After considering this evidence, we must agree with petitioners that the record is simply not sufficient to support promulgation of bicycle regulations for the National Capital Region. In particular, while the Philadelphia study might be a sufficient basis for promulgating bicycle regulations for Philadelphia, it is not adequate to establish that such regulations are necessary, desirable or practical for this Region. These regulations will accordingly be remanded to the Administrator for reconsideration. Such reconsideration should include consideration of cost factors as related to anticipated benefits.

We note that a survey of present and potential bicycle utilization in the District of Columbia has since been prepared (see Addendum E of the EPA Brief) and that its findings tend to support the EPA regulations. However, the regulations cannot be upheld on the basis of this new evidence until it has been made part of the record and petitioners have been afforded the opportunity to submit comments thereon.

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[34] The Philadelphia study consisted of questionnaires distributed at random to 500 persons in parked motor vehicles in the city's central business district. Of the 220 questionnaires which were returned, 33 percent indicated they owned bicycles and 38 percent of that group said they were likely to use bicycles for commuting if safe lanes and secure storage facilities were provided. Of the 67 percent of the sample that did not own bicycles, 17 percent said they would buy and use them for commuting if such facilities were available. No comparison was made of the likely commuting distances in Philadelphia and the Washington area.

[44] E. *Increased Bus Fleet* The National Capital plan includes regulations requiring Virginia and Maryland to submit compliance schedules showing that they, or their local governments, and the District of Columbia have made financial commitments sufficient to enable the Washington Metropolitan Area Transit Authority (WMATA) to purchase 475 new buses. Maryland and Virginia argue that this creation of parallel agreements focusing on the same object contravenes Article I, section 10, of the Constitution, which prohibits the states from entering into any agreement or compact with another state without the consent of Congress. However, WMATA was established by a compact to which Congress consented. Pub.L. 89-774, 80 Stat. 1324 (Nov. 6, 1966). Title III, Article VII, section 18, of the WMATA compact enables the Northern Virginia Transportation District, which represents Virginia, and the Washington Suburban Transit District, which represents Maryland, to make commitments for the acquisition of transit facilities and equipment. Since Congress has already approved a compact and provided means for funding, the most that could be criticized in the regulation might be a technical error in leaving open the possibility that these commitments may be made directly to WMATA by the states rather than from the states to the Districts and thence to WMATA. However, because the result will be the same in either case, we conclude that this attack on the bus fleet regulations is without merit.

[45] F. *Incompleteness of the Present Transportation Control Plan* The District of Columbia asserts that withdrawal of various regulations, and especially the demise of parking surcharge regulations, has produced a plan which is insufficient to attain the national ambient air quality standard for this Region by the target date of May 31, 1977. Because it is possible that the reevaluation of the plan necessitated by its present insufficiency may result in abandonment of programs to which the jurisdictions will have become irretrievably committed in favor of new approaches, the District argues for a remand of the entire plan to the EPA with directions that it develop a substitute set of regulations creating a comprehensive and coordinated program for attaining the air quality standards. The EPA concedes that its present plan is not sufficient to bring about the needed reduction in emissions, but it argues that it should be allowed to implement those regulations which are valid in order to make some progress toward the ultimate goal.

We believe that the EPA has taken the correct position on this issue. There has been no showing that any of the regulatitons in the present plan are likely to be proven unnecessary in the future. Furthermore, if we were to demand the promulgation of a perfect plan before any part of it may be enforced, the air quality standards might never be attained.

IV.

The exclusive bus lane regulations and the increased bus fleet regulations are affirmed. To the extent that

the bicycle lane and storage facilities regulations order the states to enact statutes and regulations, they are vacated as in excess of the Administrator's powers under the Clean Air Act. The remainder of the bicycle lane regulations are remanded to the Administrator because of an absence of evidence in the record supporting the need for such facilities and their feasibility. The inspection and maintenance regulations and the retrofit regulations are vacated to the extent that they have been held to be in excess of the Administrator's powers under the Act or to be unconstitutional, and are affirmed to the extent they prohibit the states from registering non-conforming vehicles and prohibit vehicle owners from operating them. These latter regulations are remanded to the Administrator with directions that he take prompt action to promulgate complete and enforceable regulations to replace the deficient implementation plans submitted by the states.

Judgment accordingly.

APPENDIX

The following is the text of the regulations under review in this case, as promulgated in 40 C.F.R. Part 52, Subparts J (District of Columbia), V (Maryland), and VV (Virginia):

Subpart J—District of Columbia

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§ 52.476 Compliance schedules.

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(g) With respect to the measure for increased bus fleet and service approval in § 52.472: The District of Columbia shall no later than January 31, 1974, submit a compliance schedule to put the program into effect. The compliance schedule shall, at a minimum provide that the District of Columbia shall, on or before March 1, 1974, submit to the Administrator a statement, signed both by a representative of the Washington Metropolitan Area Transit Authority (WMATA) indicating that, in the judgment of both of them, financial commitments have been made by the District of Columbia for the purchase of buses. This statement, taken in conjunction with the commitments made by the Commonwealth of Virginia and the State of Maryland, must be sufficient to enable WMATA to purchase in the fiscal year beginning the next July 1, the number of buses below:

Fiscal Year 1975—175 buses
Fiscal Year 1976—150 buses
Fiscal Year 1977—150 buses

The statement shall also indicate that WMATA has in fact committed to purchase that number of buses.

(h) With respect to the express bus lane measure approved in § 52.472:

(1) The District of Columbia shall no later than January 1, 1975, establish exclusive bus lanes in the following corridors:

(i) U.S. Route 50 from District of Columbia-Maryland boundary to Washington Central Business District (hereafter CBD).

(ii) Pennsylvania Avenue from the District of Columbia-Maryland boundary to the Washington CBD.

(iii) South Capitol Street from Bolling Air Force Base to Independence Avenue.

(iv) U.S. Route 50 from the District of Columbia-Virginia boundary to the Washington CBD.

(v) In the District of Columbia portion of a route connecting the Dulles Access Road from the Reston Interchange to the Washington CBD.

(vi) Georgia Avenue-13th Street from the District of Columbia-Maryland boundary to the Washington CBD.

(vii) U.S. Route 240 from the District of Columbia-Maryland boundary to Sheridan Circle.

(viii) New Hampshire Avenue from the District of Columbia-Maryland boundary to Grant Circle.

Such lanes shall be inbound during the morning peak and outbound during the evening peak period.

(2) The District of Columbia shall submit to the Administrator, no later than March 1, 1974, a schedule showing the steps which it will take to establish exclusive bus lanes in those corridors enumerated in paragraph (h)(1) of this section. Each schedule shall be subject to the approval of the Administrator and shall include as a minimum the following:

(i) Identification of streets or highways that shall have portions designated for exclusive bus lanes.

(ii) The date by which each street or highway shall be designated.

(3) Exclusive bus lanes must be prominently indicated by distinctively painted lines, pylons, overhead signs, or physical barriers.

(4) Application for substitution of a corridor for any of those listed in paragraph (h)(1) of this section shall be made by the District of Columbia for the Administrator's approval no later than March 1, 1974.

* * * *

§ 52.490 Inspection and maintenance program.

(a) Definition:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control-related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 lb GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with the meanings so defined.

(b) This section is applicable within the District of Columbia portion of the National Capital Interstate AQCR.

(c) In connection with the light duty vehicle inspection and maintenance program for the District of Columbia approved by the Administrator pursuant to § 52.472 the District shall establish an inspection and maintenance program applicable to all medium duty and heavy duty vehicles registered in the District that operate on public streets or highways over which it has ownership or control. The District may exempt any class or category of vehicles that the District finds is rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the District shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all medium-duty and heavy-duty motor vehicles at periodic intervals not more than 1 year apart by means of a loaded emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive within two weeks the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and

knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. This enforcement program might include spot checks of idle adjustment and/or a suitable type of physical tagging. This program shall include penalties for violation.

(5) Provisions for beginning the first inspection cycle by January 1, 1975, completing it by January 1, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After January 1, 1976, the District shall not register or allow to operate on public streets or highways any medium-duty or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After January 1, 1976, no owner of a medium-duty or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The District shall submit, no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section.

§ 52.491 Bicycle lanes and bicycle storage facilities.

(a) Definitions:

(1) "Bicycle" means a two-wheel, non-motor powered vehicle.

(2) "Bicycle lane" means a route for the exclusive use of bicycles, either constructed specifically for that purpose or converted from an existing lane.

(3) "Bicycle parking facility" means any storage facility for bicycles, which allows bicycles to be locked securely.

(4) "Parking space" means the area allocated by a parking facility for the temporary storage of one automobile.

(5) "Parking facility" means a lot, garage, building, or portion thereof, in or on which motor vehicles are temporarily parked.

(b) This section shall be applicable in the District of Columbia portion of the National Capital Interstate Air Quality Control Region.

(c) On or before July 1, 1976, the District of Columbia shall establish a network of bicycle lanes linking residential areas with employment, educational, and commercial centers in accordance with the following requirements:

(1) The network shall contain no less than 60 miles of bicycle lanes in addition to any in existence as of November 20, 1973.

(2) Each bicycle lane shall at a minimum:

(i) Be clearly marked by signs indicating that the lane is for the exclusive use of bicycles (and pedestrians, if necessary);

(ii) Be separated from motor vehicle traffic by appropriate devices, such as physical barriers, pylons, or painted lines;

(iii) Be regularly maintained and repaired;

(iv) Be of a hard, smooth surface suitable for bicycles;

(v) Be at least 5 feet wide for one-way traffic, or 8 feet wide for two-way traffic;

(vi) If in a street used by motor vehicles, be a minimum of 8 feet wide whether one-way or two-way; and

(vii) Be adequately lighted.

(3) Off-street bicycle lanes which are not reasonably suited for commuting to and from employment, education, and commercial centers shall not be considered a part of this network.

(4) On or before October 1, 1974, the District of Columbia shall establish 25 percent of the total mileage of the bicycle lane network; on or before June 1, 1975, 50 percent of the total mileage shall be established; on or about July 1, 1976, 100 percent of the total mileage shall be established.

(d) On or before June 1, 1974, the District of Columbia shall submit to the Administrator a comprehensive study of a bicycle lane and bicycle path network. The study shall include, but not be limited to the following:

(1) A bicycle user and potential user survey, which shall at a minimum determine:

(i) For present bicycle riders, the origin, destination, frequency, travel time, and distance of bicycle trips;

(ii) In high density employment areas, the present modes of transportation of employees and the potential modes of transportation, including the number of employees who would convert to the bicycle mode from other modes upon completion of the bicycle lane network described in paragraph (c) of this section.

(2) A determination of the feasibility and location of on-street bicycle lanes.

(3) A determination of the feasibility and location of off-street lanes.

(4) A determination of the special problems related to feeder lanes to bridges, on-bridge lanes, feeder lanes to METRO and railroad stations, and feeder lanes to fringe parking areas, and the means necessary to include such lanes in the bicycle lane network described in paragraph (c) of this section.

(5) A determination of the feasibility and location of various methods of safe bicycle parking.

(6) The study shall make provision for the receipt of public comments on any matter within the scope of the study, including the location of the

bicycle lane network described in paragraph (c) of this section.

(e) By June 1, 1974, in addition to the comprehensive study required pursuant to paragraph (d) of this section, the District of Columbia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish this network pursuant to paragraphs (c) and (h) of this section. The compliance schedule shall identify in detail the names of streets that will provide bicycle lanes and the location of any lanes to be constructed especially for bicycle use. It shall also include a statement indicating the source, amount, and adequacy of funds to be used in implementing this section, and the text of any needed statutory proposals and needed regulations which will be proposed for adoption.

(f) On or before October 1, 1974, the District of Columbia shall submit to the Administrator legally adopted regulations sufficient to implement and enforce all of the requirements of this section.

(g) On or before May 1, 1974, the District of Columbia shall establish a pilot bicycle lane from Key Bridge via Pennsylvania Avenue past the White House to the U.S. Capitol and from the Capitol along Pennsylvania Avenue to Alabama Avenue SE.

(h) On or before June 1, 1975, the District of Columbia shall require all owners and operators of parking facilities containing more than 50 parking spaces (including both free and commercial facilities) within the area specified in paragraph (b) of this

section to provide spaces for the storage of bicycles in the following ratio: one automobile-sized parking space (with a bicycle parking facility) for the storage of bicycles for every 75 parking spaces for the storage of autos. The District shall also require that:

(1) Bicycle parking facilities shall be so located as to be safe from motor vehicle traffic and secure from theft. They shall be properly repaired and maintained.

(2) The METRO Subway System shall provide a sufficient number of safe and secure bicycle parking facilities at each station to meet the needs of its riders.

(3) All parking facilities owned, operated, or leased by the Federal Government shall be subject to this paragraph.

(4) Any owner or operator of a parking facility which charges a fee for the storage of motor vehicles shall store bicycles at a price per unit per hour which is no greater in relation to the cost of storing them than is the price of parking for a motor vehicle in relation to the cost of storing it. Unless the owner or operator makes an affirmative showing to the District of Columbia of different facts, and agrees to charge in conformity with that showing, the ratio in costs and prices shall be determined by the maximum number of bicycles that can be stored in a single standard-sized automobile parking space.

§ 52.492 Medium duty air/fuel control retrofit.

(a) Definitions:

(1) "Air/fuel Control Retrofit" means a system or device (such as modification to the engine's carburetor or positive crankcase ventilation system) that results in engine operation at an increased air fuel ratio so as to achieve reduction in exhaust emissions of hydrocarbon and carbon monoxide from 1973 and earlier medium-duty vehicles of at least 15 and 30 percent, respectively.

(2) "Medium-duty vehicle" means a gasoline powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(3) All other terms used in this section that are defined in Part 51. Appendix N, of this chapter are used herein with meanings so defined.

(b) This section is applicable within the District of Columbia portion of the National Capital Interstate AQCR.

(c) The District of Columbia shall establish a retrofit program to ensure that on or before May 31, 1976, all medium-duty vehicles of model years prior to 1973 which are not required to be retrofitted with an oxidizing catalyst or other approved device pursuant to § 52.495 which are registered in the area specified in paragraph (b) of this section, are equipped with an appropriate air/fuel control device or other device as approved by the Administrator that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as an air/fuel control device. No later than February 1, 1974, the District of Columbia shall submit to the Administrator a detailed compliance schedule showing the

steps it will take to establish and enforce a retrofit program pursuant to this section. The compliance schedule shall include a date by which the District shall evaluate and approve devices for use in this program. Such date shall be no later than September 30, 1974.

(d) No later than April 1, 1974, the District shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by August 1, 1975, and completing the installation of the devices on all vehicles subject to this section no later than May 31, 1976.

(4) A provision that no later than May 31, 1976, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.490 unless it has been first equipped with an approved air/fuel control device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training

and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emission testing at the time of device installation or some other positive assurance that the device is installed and operating correctly.

(e) After May 31, 1976, the District shall not register or allow to operate on its streets or highways any vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1976, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implemented by this section.

(g) The District may exempt any class or category of vehicles from this section which the District finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the District demonstrates to the Administrator that air/fuel control devices or other devices approved pursuant to this section are not commercially available.

§ 52.494 Heavy duty air/fuel control retrofit

(a) Definitions:

(1) "Air/Fuel Control Retrofit" means a system or device (such as modification to the engine's carburetor or positive crankcase ventilation system) that

results in engine operation at an increased air/fuel ratio so as to achieve reduction in exhaust emissions of hydrocarbon and carbon monoxide from heavy-duty vehicles of at least 30 and 40 percent, respectively.

(2) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 lb gross vehicle weight (GVW) or more.

(3) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with meanings so defined.

(b) This section is applicable within the District of Columbia portion of the National Capital Interstate AQCR.

(c) The District of Columbia shall establish a retrofit program to ensure that on or before May 31, 1977, all heavy-duty vehicles registered in the area specified in paragraph (b) of this section are equipped with an appropriate air/fuel control device, or other device as approved by the Administrator that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as an air/fuel control device. No later than April 1, 1974, the District of Columbia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section. The compliance schedule shall include a date by which the District shall evaluate and approve devices for use in this program. Such date shall be no later than January 1, 1975.

(d) No later than September 1, 1974, the District shall submit legally adopted regulations to the Ad-

ministrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1976, and completing the installation of the devices on all vehicles subject to this section no later than May 31, 1977.

(4) A provision that starting no later than May 31, 1977, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.490 unless it has been first equipped with an approved air/fuel control device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

5) Methods and procedures for insuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation or some other positive assur-

ance that the device is installed and operating correctly.

(e) After May 31, 1977, the District shall not register or allow to operate on its streets or highways any vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1977, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) The District may exempt any class or category of vehicles from this section which the District finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the District demonstrates to the Administrator that air/fuel control or other devices approved pursuant to this section are not commercially available.

§ 52.495 Oxidizing catalyst retrofit.

(a) Definitions:

(1) "Oxidizing catalyst" means a device that uses a catalyst installed in the exhaust system of a vehicle (and if necessary includes an air pump) so as to achieve a reduction in exhaust emissions of hydrocarbon and carbon monoxide of at least 50 and 50 percent, respectively, from light-duty vehicles of 1971 through 1975 model years, and of at least 50 and 50 percent, respectively, from medium duty vehicles of 1971 through 1975 model years.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Fleet vehicle" means any of 5 or more light-duty vehicles operated by the same person(s), business, or governmental entity and used principally in connection with the same or related occupations or uses. This definition shall also include any taxicab (or other light-duty vehicle-for-hire) owned by any individual or business.

(5) All other terms used in this section that are defined in Part 51, Appendix N, are used herein with meanings so defined.

(b) This section is applicable within the District of Columbia portion of the National Capital Interstate AQCR.

(c) The District of Columbia shall establish a retrofit program to ensure that on or before May 31, 1977, all light-duty fleet vehicles of model years 1971 through 1975 and all medium-duty vehicles of model years 1971 through 1975 which are registered in the area specified in paragraph (b) of this section and are able to operate on 91RON gasoline are equipped with an appropriate oxidizing catalyst retrofit device or other device, as approved by the Administrator, that will reduce exhaust emissions of hydrocarbon and carbon monoxide to the same extent as an oxidizing catalyst retrofit device. No later than April 1,

1974, the District of Columbia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section. The compliance schedule shall include a date by which the District shall evaluate and approve devices for use in this program. Such date shall be no later than January 1, 1975.

(d) No later than September 1, 1974, the District shall submit legally adopted regulations to the Administrator establishing such a program.

The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1976, and completing the installation of the devices on all vehicles subject to this section no later than May 31, 1977.

(4) A provision that starting no later than May 31, 1977, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by §§ 52.472 and 52.490 unless it has been first equipped with an approved oxidizing catalyst device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test

procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation or some other positive assurance that the device is installed and operating correctly.

(e) After May 31, 1977, the District shall not register or allow to operate on its streets or highways any vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1977, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) Any vehicle which is manufactured equipped with an oxidizing catalyst, or which is certified to meet the original 1975 light duty vehicle emissions standards set forth in section 202(b)(1)(a) of the Clean Air Act of 1970 (without regard to any suspension of such standards), shall be exempt from the requirements of this section.

§ 52.496 Vacuum spark advance disconnect retrofit.

(a) Definitions:

(1) "Vacuum spark advance disconnect retrofit" means a device or system installed on a motor vehicle that prevents the ignition vacuum, advance from operating either when the vehicle's transmission is in the lower gears, or when the vehicle is traveling below a predetermined speed, so as to achieve reduction in exhaust emissions of hydrocarbon and carbon monoxide from 1967 and earlier light-duty vehicles of at least 25 and 9 percent, respectively.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) All other terms used in this section that are defined in Part 51, Appendix N, are used herein with meanings so defined.

(b) This section is applicable within the District of Columbia portion of the National Capital Interstate AQCR.

(c) The District of Columbia shall establish a retrofit program to ensure that on or before January 1, 1976, all light-duty vehicles of model years prior to 1968 registered in the area specified in paragraph (b) of this section are equipped with an appropriate vacuum spark advance disconnect retrofit device or other device, as approved by the Administrator, that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as a vacuum spark advance disconnect retrofit. No later than February 1, 1974, the District shall submit to the Ad-

ministrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section. The compliance schedule shall include a date by which the District shall evaluate and approve devices for use in this program. Such date shall be no later than September 30, 1974.

(d) No later than April 1, 1974, the District shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1975, and completing the installation of the devices on all vehicles subject to this section no later than January 1, 1976.

(4) A provision that starting no later than January 1, 1976, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.472 unless it has been first equipped with an approved vacuum spark advance disconnect retrofit device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply retrofit components.

(6) Provisions (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation, or some other positive assurance that the device is installed and operating correctly.

(e) After January 1, 1976, the District shall not register or allow to operate on its streets or highways any light-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After January 1, 1976, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) The District may exempt any class or category of vehicles from this section which the District finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the State demonstrates to the Administrator that vacuum spark advance disconnect devices or other devices approved pursuant to this section are not commercially available.

Subpart V—Maryland

* * * *

§ 52.1080 Compliance schedule.

* * * *

(g) With respect to the measure for increased bus fleet and service approved in § 52.1073: The State of Maryland shall no later than January 31, 1974, submit a compliance schedule to put the program into effect. The compliance schedule shall, at a minimum, provide that the State of Maryland shall, on or before March 1, 1974, submit to the Administrator a statement, signed both by a representative of the State of Maryland, and by a representative of the Washington Metropolitan Area Transit Authority (WMATA) indicating that, in the judgment of both of them, financial commitments have been made by the State of Maryland or by its local governments for the purchase of buses. This statement, when taken in conjunction with the commitments made by the District of Columbia and the Commonwealth of Virginia, must be sufficient to enable WMATA to purchase in the fiscal year beginning the next July 1 the number of buses indicated below:

Fiscal Year 1975—175 buses
Fiscal Year 1976—150 buses
Fiscal Year 1977—150 buses

The statement shall also indicate that WMATA has in fact committed to purchase that number of buses.

(h) With respect to the express bus lane measure approved in § 52.1073:

(1) The State of Maryland shall no later than January 1, 1975, establish exclusive bus lanes in the following corridors:

(i) U.S. Route 50 from New Carrollton to the Maryland-District of Columbia boundary.

(ii) Pennsylvania Avenue and Maryland Route 4 from Andrews Air Force Base to the Maryland-District of Columbia boundary.

(iii) U.S. Route 240 from Old Georgetown Road to the Maryland-District of Columbia boundary.

(iv) New Hampshire Avenue from U.S. Route 29 to the Maryland-District of Columbia boundary.

Such lanes shall be inbound during the morning peak and outbound during the evening peak periods.

(2) The State of Maryland shall submit to the Administrator, no later than March 1, 1974, a schedule showing the steps which it will take to establish exclusive bus lanes in those corridors enumerated in paragraph (h)(1) of this section. Each schedule shall be subject to approval by the Administrator and shall include as a minimum the following:

(i) Identification of streets or highways that shall have portions designated for exclusive bus lanes.

(ii) The date by which each street or highway shall be designated

(3) Exclusive bus lanes must be prominently indicated by distinctively painted lines, pylons, overhead signs, or physical barriers.

(4) Application for substitution of a corridor for any of those listed in paragraph (h)(1) of this sec-

tion shall be made by the State of Maryland for the Administrator's approval no later than March 1, 1974.

* * * *

§ 52.1089 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control-related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with the meanings so defined.

(b) This section is applicable within the Maryland portion of the National Capital Interstate AQCR.

(c) The State of Maryland shall establish an inspection and maintenance program applicable to all light-duty, medium-duty, and heavy-duty vehicles registered in the area specified in paragraph (b) of this section that operate on public streets or highways over which it has ownership or control. The State

may exempt any class or category of vehicles that the State finds is rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the State shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all light-duty, medium-duty, and heavy-duty motor vehicles at periodic intervals, no more than 1 year apart by means of a leaded emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles received within two weeks, the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. This enforcement program might include spot checks of idle adjustments

and/or a suitable type of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspection cycle by August 1, 1975, and completing it by July 31, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After July 31, 1976, the State shall not register or allow to operate on public streets or highways any light-duty, medium-duty, or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After July 31, 1976, no owner of a light-duty, medium-duty, or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The State of Maryland shall submit, no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including:

(1) The text of needed statutory proposals and regulations that it will propose for adoption.

(2) The date by which the State will recommend needed legislation to the State legislature.

(3) The date by which necessary equipment will be ordered.

(4) A signed statement from the Governor or his designee identifying the sources and amounts of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed legislation shall be submitted.

§ 52.1090 Bicycle lanes and bicycle storage facilities.

(a) Definitions:

(1) "Bicycle" means a two-wheel, non-motor powered vehicle.

(2) "Bicycle lane" means a route for the exclusive use of bicycles, either constructed specifically for that purpose or converted from an existing lane.

(3) "Bicycle parking facility" means any storage facility for bicycles, which allows bicycles to be locked securely.

(4) "Parking space" means the area allocated by a parking facility for the temporary storage of one automobile.

(5) "Parking facility" means a lot, garage, building, or portion thereof, in or on which motor vehicles are temporarily parked.

(b) This section shall be applicable in the State of Maryland portion of the National Capital Interstate Air Quality Control Region.

(c) On or before July 1, 1976, the State of Maryland shall establish a network of bicycle lanes linking

residential areas with employment, educational, and commercial centers in accordance with the following requirements:

(1) The network shall contain no less than 60 miles of bicycle lanes in addition to any in existence as of November 20, 1973.

(2) Each bicycle lane shall at a minimum:

(i) Be clearly marked by signs indicating that the lane is for the exclusive use of bicycles (and pedestrians, if necessary);

(ii) Be separated from motor vehicle traffic by appropriate devices, such as physical barriers, pylons, or painted lines;

(iii) Be regularly maintained and repaired;

(iv) Be of a hard, smooth surface suitable for bicycles;

(v) Be at least 5 feet wide for one-way traffic, or 8 feet wide for two-way traffic;

(vi) If in a street used by motor vehicles, be a minimum of 8 feet wide whether one-way or two-way; and

(vii) Be adequately lighted.

(3) Off-street bicycle lanes which are not reasonably suited for commuting to and from employment, educational, and commercial centers shall not be considered a part of this network.

(4) On or before October 1, 1974, the State of Maryland shall establish 25 percent of the total mileage of the bicycle lane network; on or before June 1, 1975, 50 percent of the total mileage shall be

established; on or before July 1, 1976, 100 percent of the total mileage shall be established.

(d) On or before June 1, 1974, the State of Maryland shall submit to the Administrator a comprehensive study of a bicycle lane and bicycle path network. The study shall include, but not be limited to the following:

(1) A bicycle user and potential user survey, which shall at a minimum determine:

(i) For present bicycle riders, the origin, destination, frequency, travel time, and distance of bicycle trips;

(ii) In high density employment areas, the present modes of transportation of employees and the potential modes of transportation, including the number of employees who would convert to the bicycle mode from other modes upon completion of the bicycle lane network described in paragraph (c) of this section.

(2) A determination of the feasibility and location of on-street bicycle lanes.

(3) A determination of the feasibility and location of off-street lanes.

(4) A determination of the special problems related to feeder lanes to bridges, on-bridge lanes, feeder lanes to METRO and railroad stations, and feeder lanes to fringe parking areas, and the means necessary to include such lanes in the bicycle lane network described in paragraph (c) of this section.

(5) A determination of the feasibility and location of various methods of safe bicycle parking.

(6) The study shall make provision for the receipt of public comments on any matter within the scope of the study, including the location of the bicycle lane network described in paragraph (c) of this section.

(e) By June 1, 1974, in addition to the comprehensive study required pursuant to paragraph (d) of this section, the State of Maryland shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish this network pursuant to paragraphs (c) and (g) of this section. The compliance schedule shall identify in detail the names of streets that will provide bicycle lanes and the location of any lanes to be constructed especially for bicycle use. It shall also include a statement indicating the source, amount, and adequacy of funds to be used in implementing this section, and the text of any needed statutory proposals and needed regulations which will be proposed for adoption.

(f) On or before October 1, 1974, the State of Maryland shall submit to the Administrator legally adopted regulations sufficient to implement and enforce all of the requirements of this section.

(g) On or before June 1, 1975, the State of Maryland shall require all owners and operators of parking facilities containing more than 50 parking spaces (including both free and commercial facilities) within the area specified in paragraph (b) of this section to provide spaces for the storage of bicycles in the following ratio: one automobile-sized parking space (with a bicycle parking facility) for the storage of bicycles for every 75 parking spaces for the storage of autos.

(1) Bicycle parking facilities shall be so located as to be safe from motor vehicle traffic and secure from theft. They shall be properly repaired and maintained.

(2) The METRO Subway System shall provide a sufficient number of safe and secure bicycle parking facilities at each station to meet the needs of its riders.

(3) All parking facilities owned, operated, or leased by the Federal Government shall be subject to this paragraph.

(4) Any owner or operator of a parking facility which charges a fee for the storage of motor vehicles shall store bicycles at a price per unit per hour which is no greater in relation to the cost of storing them than is the price of parking for a motor vehicle in relation to the cost of storing it. Unless the owner or operator makes an affirmative showing to the State of Maryland of different facts, and agrees to charge in conformity with that showing, the ratio in costs and prices shall be determined by the maximum number of bicycles that can be stored in a single standard-sized automobile parking space.

§ 52.1091 Medium-duty air/fuel control retrofit.

(a) Definitions:

(1) "Air/Fuel Control Retrofit" means a system or device (such as modification to the engine's carburetor or positive crankcase ventilation system) that results in engine operation at an increased air/fuel ratio so as to achieve reduction in exhaust emissions

of hydrocarbons and carbon monoxide from 1973 and earlier medium-duty vehicles of at least 15 and 30 percent, respectively.

(2) "Medium-duty vehicle" means a gasoline powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(3) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with meanings so defined.

(b) This section is applicable within the Maryland portion of the National Capital Interstate AQCR.

(c) The State of Maryland shall establish a retrofit program to ensure that on or before May 31, 1976, all medium-duty vehicles of model years prior to 1973 which are not required to be retrofitted with an oxidizing catalyst or other approved device pursuant to § 52.1093 of this chapter, which are registered in the area specified in paragraph (b) of this section, are equipped with an appropriate air/fuel control device or other device as approved by the Administrator that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as an air/fuel control device. No later than February 1, 1974, the State of Maryland shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section, including the text of statutory proposals, regulations, and enforcement procedures that the State proposes for adoption. The compliance schedule shall also include a date by which the State shall evaluate and approve

devices for use in this program. Such date shall be no later than September 30, 1974.

(d) No later than April 1, 1974, the State shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of any agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by August 1, 1975, and completing the installation of the devices on all vehicles subject to this section no later than May 31, 1976.

(4) A provision that no later than May 31, 1976, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.1089 unless it has been first equipped with an approved air/fuel control device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those persons installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation or some other positive assurance that the device is installed and operating correctly.

(e) After May 31, 1976, the State shall not register or allow to operate on its streets or highways any vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1976, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implemented by this section.

(g) The State may exempt any class or category of vehicles from this section which the State finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the State demonstrates to the Administrator that air/fuel control devices or other devices approved pursuant to this section are not commercially available.

§ 52.1092 Heavy-duty air/fuel control retrofit.

(a) Definitions:

(1) "Air/Fuel Control Retrofit" means a system or device (such as modification to the engine's carburetor or positive crankcase ventilation system) that results in engine operation at an increased air-fuel ratio so as to achieve reduction in exhaust emissions

of hydrocarbon and carbon monoxide from heavy-duty vehicles of at least 30 and 40 percent, respectively.

(2) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 lb gross vehicle weight (GVW) or more.

(3) All other terms used in this section that are defined in Part 51, Appendix N, are used herein with meanings so defined.

(b) This section is applicable within the Maryland portion of the National Capital Interstate AQCR.

(c) The State of Maryland shall establish a retrofit program to ensure that on or before May 31, 1977, all heavy-duty vehicles registered in the areas specified in paragraph (b) of this section are equipped with an appropriate air/fuel control retrofit or other device as approved by the Administrator that will reduce exhaust emissions of hydrocarbons and carbon monoxide at least to the same extent as an air/fuel control retrofit. No later than April 1, 1974, the State of Maryland shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section, including the text of statutory proposals, regulations, and enforcement procedures that the State proposes for adoption. The compliance schedule shall also include a date by which the State shall evaluate and approve devices for use in this program. Such date shall be no later than January 1, 1975.

(d) No later than September 1, 1974, the State shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1976, and completing the installation of the device on all vehicles subject to this section no later than May 31, 1977.

(4) A provision that starting no later than May 31, 1977, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.1089 unless it has been first equipped with an approved air/fuel control retrofit, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the

time of device installation or some other positive assurance that the device is installed and operating correctly.

(e) After May 31, 1977, the State shall not register or allow to operate on its streets or highways any vehicle that does not comply with the applicable standards and procedurcs adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1977, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) The State may exempt any class or category of vehicles from this section which the State finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the State demonstrates to the Administrator that air/fuel control retrofits or other devices approved pursuant to this section are not commercially available.

§ 52.1093 Oxidizing catalyst retrofit.

(a) Definitions:

(1) "Oxidizing catalyst" means a device that uses a catalyst installed in the exhaust system of a vehicle (and if necessary includes an air pump) so as to achieve a reduction in exhaust emissions of hydrocarbon and carbon monoxide of at least 50 and 50 percent, respectively, from light duty vehicles of 1971 through 1975 model years, and of at least 50 and

50 percent, respectively, from medium duty vehicles of 1971 through 1975 model years.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Fleet vehicle" means any of 5 or more light duty vehicles operated by the same person(s), business, or governmental entity and used principally in connection with the same or related occupations or uses. This definition shall also include any taxicab (or other light duty vehicle-for-hire) owned by any individual or business.

(5) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with meanings so defined.

(b) This section is applicable within the Maryland portion of the National Capital Interstate AQCR.

(c) The State of Maryland shall establish a retrofit program to ensure that on or before May 31, 1977, all light-duty fleet vehicles of model years 1971 through 1975, and all medium-duty vehicles of model years 1971 through 1975 which are registered in the area specified in paragraph (b) of this section and are able to operate on 91 RON gasoline are equipped with an appropriate oxidizing catalyst retrofit device, or other device, as approved by the Administrator, that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as an oxidizing catalyst retrofit device. No later than April 1, 1974, the State of Maryland shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section, including the text of statutory proposals, regulations, and enforcement procedures that the State proposes for adoption. The compliance schedule shall also include a date by which the State shall evaluate and approve devices for use in this program. Such data shall be no later than January 1, 1975.

(d) No later than September 1, 1974, the State shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1976, and for completing the installation of the devices on all vehicles subject to this section no later than May 31, 1977.

(4) A provision that starting no later than May 31, 1977, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.1089 unless it has been first equipped with an approved oxidizing catalyst device, or other device approved pursuant to this section,

which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation, or some other positive assurance that the device is installed and operating correctly.

(e) After May 31, 1977, the State shall not register or allow to operate on its streets and highways any vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1977, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) Any vehicle which is manufactured equipped with an oxidizing catalyst, or which is certified to meet the original 1975 light duty vehicle emissions standards set forth in section 202(b)(1)(a) of the Clean Air Act of 1970 (without regard to any suspension of such standards), shall be exempt from the requirements of this section.

§ 52.1094 Vacuum spark advance disconnect retrofit.

(a) Definitions:

(1) "Vacuum spark advance disconnect retrofit" means a device or system installed on a motor vehicle that prevents the ignition vacuum advance from operating either when the vehicle's transmission is in the lower gears, or when the vehicle is traveling below a predetermined speed, so as to achieve reduction in exhaust emissions of hydrocarbon and carbon monoxide from 1967 and earlier light-duty vehicles of at least 25 and 9 percent, respectively.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with meanings so defined.

(b) This section is applicable within the Maryland portion of the National Capital Interstate AQCR.

(c) The State of Maryland shall establish a retrofit program to ensure that on or before January 1, 1976, all light duty vehicles of model years prior to 1968 registered in the area specified in paragraph (b) of this section are equipped with an appropriate vacuum spark advance disconnect retrofit device or other device, as approved by the Administrator, that will reduce exhaust emissions of hydrocarbons and carbon monoxide at least to the same extent as a vacuum spark advance disconnect retrofit. No later than February 1, 1974, the State of Maryland shall submit to the Administrator a detailed compliance

schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section, including the text of statutory proposals, regulations, and enforcement procedures that the State proposes for adoption. The compliance schedule shall also include a date by which the State shall evaluate and approve devices for use in this program. Such date shall be no later than September 30, 1974.

(d) No later than April 1, 1974, the State shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1975, and completing the installation of the devices on all vehicles subject to this section no later than January 1, 1976.

(4) A provision that starting no later than January 1, 1976, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for § 52.1089 unless it has been first equipped with an approved vacuum spark advance disconnect retrofit device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation or some other positive assurance that the device is installed and operating correctly.

(e) After January 1, 1976 the State shall not register or allow to operate on its streets or highways any light-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After January 1, 1976, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) The State may exempt any class or category of vehicles from this section which the State finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the State demonstrates to the Administrator that vacuum spark advance disconnect devices or other devices approved pursuant to this section are not commercially available.

Subpart VV—Virginia

* * * *

§ 52.2435 Compliance schedules.

* * * *

(e) With respect to the measure for increased bus fleet and service approved in § 52.2423. The Commonwealth of Virginia shall no later than January 31, 1974, submit a compliance schedule to put the program in effect. The compliance schedule shall, at a minimum, provide that the Commonwealth of Virginia shall, on or before March 1, 1974, submit to the Administrator a statement, signed both by a representative of the Commonwealth of Virginia and by a representative of the Washington Metropolitan Area Transit Authority (WMATA) indicating that, in the judgment of both of them, financial commitments have been made by the Commonwealth of Virginia or by its local governments for the purchase of buses. This statement, when taken in conjunction with the commitments made by the District of Columbia and the State of Maryland must be sufficient to enable WMATA to purchase in the fiscal year beginning the next July 1 the number of buses indicated below:

Fiscal Year 1975—175 buses
Fiscal Year 1976—150 buses
Fiscal Year 1977—150 buses

The statement shall also indicate that WMATA has in fact committed to purchase that number of buses.

(f) With respect to the express bus lane measure approved in § 52.2423:

(1) The Commonwealth of Virginia shall no later than January 1, 1975, establish exclusive bus lanes in the following corridors:

(i) George Washington Parkway—Washington Street—Jefferson Davis Highway from Fort Hunt to National Airport.

(ii) U.S. Route 50 from Seven Corners to the Virginia-District of Columbia boundary.

Such lanes shall be inbound during the morning peak period and outbound during the evening peak period.

(2) The Commonwealth of Virginia shall submit to the Administrator, no later than March 1, 1974, a schedule showing the steps which it will take to establish exclusive bus lanes in those corridors enumerated in paragraph (f)(1) of this section. Each schedule shall be subject to approval by the Administrator and shall include as a minimum the following:

(i) Identification of streets or highways that shall have portions designated for exclusive bus lanes.

(ii) The date by which each street or highway shall be designated.

(3) Exclusive bus lanes must be prominently indicated by distinctively painted lines, pylons, overhead signs, or physical barriers.

(4) Application for substitution of a corridor for of those listed in paragraph (f)(1) of this section shall be made by the Commonwealth of Virginia for

the Administrator's approval no later than March 1, 1974.

* * * *

§ 52.2441 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 lb GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, are used herein with the meanings so defined.

(b) This section is applicable within the Virginia portion of the National Capital Interstate AQCR.

(c) In connection with the light-duty vehicle inspection and maintenance program for the area specified in paragraph (b) of this section approved by the Administrator pursuant to § 52.2423, the Commonwealth of Virginia shall establish an inspection and maintenance program applicable to all medium-duty and heavy-duty vehicles registered in any area specified in paragraph (b) of this section that operate

on public streets or highways over which it has ownership or control. The Commonwealth may exempt any class or category of vehicles that the Commonwealth finds is rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the Commonwealth shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all medium-duty and heavy-duty motor vehicles at periodic intervals no more than 1 year apart by means of an idle emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive, within two weeks, the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply

with the inspection standards. This enforcement program might include spot checks of idle adjustments and/or a suitable type of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspection cycle by January 1, 1975, and completing it by January 1, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenace program.

(d) After January 1, 1976, the Commonwealth shall not register or allow to operate on public streets or highways any medium-duty or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After January 1, 1976, no owner of a medium-duty or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The Commonwealth of Virginia shall submit, no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including:

(1) The text of needed statutory proposals and regulations that it will propose for adoption.

(2) The date by which the Commonwealth will recommend needed legislation to the legislature.

(3) The date by which necessary equipment will be ordered.

(4) A signed statement from the Governor or his designee identifying the sources and amounts of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed iegislation shall be submitted.

§ 52.2442 Bicycle lanes and bicycle storage facilities.

(a) Definitions:

(1) "Bicycle" means a two-wheel, non-motor powered vehicle.

(2) "Bicycle lane" means a route for the exclusive use of bicycles, either constructed specifically for that purpose or converted from an existing lane.

(3) "Bicycle parking facility" means any storage facility for bicycles, which allows bicycles to be locked securely.

(4) "Parking space" means the area allocated by a parking facility for the temporary storage of one automobile.

(5) "Parking facility" means a lot, garage, building or portion thereof, in or on which motor vehicles are temporarily parked.

(b) This section shall be applicable in the Commonwealth of Virginia portion of the National Capital Interstate Air Quality Control Region.

(c) On or before July 1, 1976, the Commonwealth of Virginia shall establish a network of bicycle lanes

linking residential areas with employment, educational, and commercial centers in accordance with the following requirements:

(1) The network shall contain no less than 60 miles of bicycle lanes in addition to any in existence as of November 20, 1973.

(2) Each bicycle lane shall at a minimum:

(i) Be clearly marked by signs indicating that the lane is for the exclusive use of bicycles (and pedestrians, if necessary);

(ii) Be separated from motor vehicle traffic by appropriate devices, such as physical barriers, pylons, or painted lines;

(iii) Be regularly maintained and repaired;

(iv) Be of a hard, smooth surface suitable for bicycles;

(v) Be at least 5 feet wide for one-way traffic, or 8 feet wide for two-way traffic;

(vi) If in a street used by motor vehicles, be a minimum of 8 feet wide whether one-way or two-way; and

(vii) Be adequately lighted.

(3) Off-street bicycle lanes which are not reasonably suited for commuting to and from employment, educational, and commercial centers shall not be considered a part of this network.

(4) On or before October 1, 1974, the Commonwealth of Virginia shall establish 25 percent of the total mileage of the bicycle lane network: on or before June 1, 1975, 50 percent of the total mileage

shall be established; on or before July 1, 1976, 100 percent of the total mileage shall be established.

(d) On or before June 1, 1974, the Commonwealth of Virginia shall submit to the Administrator a comprehensive study of a bicycle lane and bicycle path network. The study shall include, but not be limited to the following:

(1) A bicycle user and potential user survey, which shall at a minimum determine:

(i) For present bicycle riders, the origin, destination, frequency, travel time, and distance of bicycle trips;

(ii) In high density employment areas, the present modes of transportation of employees and the potential modes of transportation, including the number of employees who would convert to the bicycle mode from other modes upon completion of the bicycle lane network described in paragraph (c) of this section.

(2) A determination of the feasibility and location of on-street bicycle lanes.

(3) A determination of the feasibility and location of off-street lanes.

(4) A determination of the special problems related to feeder lanes to bridges, on-bridge lanes, feeder lanes to METRO and railroad stations, and feeder lanes to fringe parking areas, and the means necessary to include such lanes in the bicycle lane network described in paragraph (c) of this section.

(5) A determination of the feasibility and location of various methods of safe bicycle parking.

(6) The study shall make provision for the receipt of public comments on any matter within the scope of the study, including the location of the bicycle lane network described in paragraph (c) of this section.

(e) By June 1, 1974, in addition to the comprehensive study required pursuant to paragraph (d) of this section, the Commonwealth of Virginia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish this network pursuant to paragraphs (c) and (g) of this section. The compliance schedule shall identify in detail the names of streets that will provide bicycle lanes and the location of any lanes to be constructed especially for bicycle use. It shall also include a statement indicating the source, amount, and adequacy of funds to be used in implementing this section, and the text of any needed statutory proposals and needed regulations which will be proposed for adoption.

(f) On or before October 1, 1974, the Commonwealth of Virginia shall submit to the Administrator legally adopted regulations sufficient to implement and enforce all of the requirements of this section.

(g) On or before June 1, 1975, the Commonwealth of Virginia shall require all owners and operators of parking facilities containing more than 50 parking spaces (including both free and commercial facilities) within the area specified in paragraph (b) of this section to provide spaces for the storage of bicycles in the following ratio: one automobile-size parking space (with a bicycle parking facility) for

the storage of bicycles for every 75 parking spaces for the storage of autos. The Commonwealth shall also require that:

(1) Bicycle parking facilities shall be so located as to be safe from motor vehicle traffic and secure from theft. They shall be properly repaired and maintained.

(2) The METRO Subway System shall provide a sufficient number of safe and secure bicycle parking facilities at each station to meet the needs of its riders.

(3) All parking facilities owned, operated, or leased by the Federal Government shall be subject to this paragraph.

(4) Any owner or operator of a parking facility which charges a fee for the storage of motor vehicles shall store bicycles at a price per unit per hour which is no greater in relation to the cost of storing them than is the price of parking for a motor vehicle in relation to the cost of storing it. Unless the owner or operator makes an affirmative showing to the Commonwealth of Virginia of different facts, and agrees to charge in conformity with that showing, the ratio in costs and prices shall be determined by the maximum number of bicycles that can be stored in a single standard-sized automobile parking space.

§ 52.2444 Medium duty air/fuel control retrofit.

(a) Definitions:

(1) "Air/Fuel Control Retrofit" means a system or device (such as modification to the engine's carbu-

retor or positive crankcase ventilation system) that results in engine operation at an increased air-fuel ratio so as to achieve reductions in exhaust emissions of hydrocarbon and carbon monoxide from 1973 and earlier medium-duty vehicles of at least 15 and 30 percent, respectively.

(2) "Medium-duty vehicle" means a gasoline powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(3) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with meanings so defined.

(b) This section is applicable within the Virginia portion of the National Capital Interstate AQCR.

(c) The Commonwealth of Virginia shall establish a retrofit program to ensure that on or before May 31, 1976, all medium-duty vehicles of model years prior to 1973 which are not required to be retrofitted with an oxidizing catalyst or other approved device pursuant to § 52.2446, which are registered in the area specified in paragraph (b) of this section, are equipped with an appropriate Air/Fuel Control device or other device as approved by the Administrator that will reduce exhaust emissions of hydrocarbon and carbon monoxide to the same extent as an air/fuel control device. No later than February 1, 1974, the Commonwealth of Virginia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section, including the text of statutory proposals, regulations,

and enforcement procedures that the Commonwealth proposes for adoption. The compliance schedule shall also include a date by which the Commonwealth shall evaluate and approve devices for use in this program. Such date shall be no later than September 30, 1974.

(d) No later than April 1, 1974, the Commonwealth shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the devices by August 1, 1975, and completing the installation of the devices on all vehicles subject to this section no later than May 31, 1976.

(4) A provision that no later than May 31, 1976, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.2441 unless it has been first equipped with an approved air/fuel control device or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those persons installing the retrofit device have the training and ability to perform the needed tasks sat-

isfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation or some other positive assurance that the device is installed and operating correctly.

(e) After May 31, 1976, the Commonwealth shall not register or allow to operate on its streets or highways any vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1976, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implemented by this section.

(g) The Commonwealth may exempt any class or category of vehicles from this section which the Commonwealth finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the Commonwealth demonstrates to the Administrator that air/fuel control devices or other devices approved pursuant to this section are not commercially available.

§ 52.2445 Heavy duty air/fuel control retrofit.

(a) Definitions:

(1) "Air/Fuel Control Retrofit" means a system or device (such as modification to the engine's carburetor or positive crankcase ventilation system) that results in engine operation at an increased air/fuel ratio so as to achieve reduction in exhaust emissions of hydrocarbon and carbon monoxide from heavy-duty vehicles of at least 30 and 40 percent, respectively.

(2) "Heavy duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 lb gross vehicle weight or more.

(3) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with meanings so defined.

(b) This section is applicable within the Virginia portion of the National Capital Interstate AQCR.

(c) The Commonwealth of Virginia shall establish a retrofit program to ensure that on or before May 31, 1977, all heavy duty vehicles registered in the area specified in paragraph (b) of this section are equipped with an appropriate air/fuel control device or other device as approved by the Administrator that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as an air/fuel control device. No later than April 1, 1974, the Commonwealth of Virginia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section, including the text of statutory proposals, regulations, and enforcement procedures that the Commonwealth proposes for adoption. The compliance schedule shall also include a date by which the Commonwealth shall evaluate and

approve devices for use in this program. Such date shall be no later than January 1, 1975.

(d) No later than September 1, 1974, the Commonwealth shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1976, and completing the installation of the devices on all vehicles subject to this section no later than May 31, 1977.

(4) A provision that starting no later than May 31, 1977, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.2441 unless it has been first equipped with an approved air/fuel control device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation or some other positive assurance that the device is installed and operating correctly.

(g) The Commonwealth may exempt any class or category of vehicles from this section which the Commonwealth finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the Commonwealth demonstrates to the Administrator that air/fuel control device or other devices approved pursuant to this section are not commercially available.

§ 52.2446 Oxidizing catalyst retrofit.

(a) Defiinitions:

(1) "Oxidizing catalyst" means a device that uses a catalyst installed in the exhaust system of a vehicle (and if necessary includes an air pump) so as to achieve reduction in exhaust emissions of hydrocarbon and carbon monoxide of at least 50 and 50 percent, respectively, from light duty vehicles of 1971 through 1975 model years, and of at least 50 to 50 percent, respectively, from medium duty vehicles of 1971 through 1975 model years.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Fleet vehicle" means any of 5 or more light-duty vehicles operated by the same person(s), business, or governmental entity and used principally in connection with the same or related occupations or uses. This definition shall also include any taxicab (or other light-duty vehicle-for-hire) owned by any individual or business.

(5) All other terms used in this section that are defined in Part 51, Appendix N, are used herein with meanings so defined.

(b) This section is applicable within the Virginia portion of the National Capital Interstate AQCR.

(c) The Commonwealth of Virginia shall establish a retrofit program to ensure that on or before May 31, 1977, all light-duty fleet vehicles of model years 1971 through 1975 and medium-duty vehicles of model years 1971 through 1975 which are registered in the area specified in paragraph (b) of this section and are able to operate on 91 RON gasoline, are equipped with an appropriate oxidizing catalyst retrofit device or other device, as approved by the Administrator, that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as an oxidizing catalyst retrofit device. No later than April 1, 1974, the Commonwealth of Virginia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section including the text of statutory proposals, regulations, and enforcement procedures that the Commonwealth proposes for adoption. The compliance

schedule shall also include a date by which the Commonwealth shall evaluate and approve devices for use in this program. Such date shall be no later than January 1, 1975.

(d) No later than September 1, 1974, the Commonwealth shall submit legally adopted regulations to the Administrator establishing such a program. The regulation shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1976, and completing the installation of the devices on all vehicles subject to this section no later than May 31, 1977.

(4) A provision that starting no later than May 31, 1977, no vehicle for which retrofit is required under this section shall pass the annual emission test provided for by §§ 52.2423 and 52.2441 unless it has been first equipped with an approved oxidizing catalyst device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation or some other positive assurance that the device is installed and operating correctly.

(e) After May 31, 1977, the Commonwealth shall not register or allow to operate on its streets or highways any vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After May 31, 1977, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) Any vehicle which is manufactured equipped with an oxidizing catalyst, or which is certified to meet the original 1975 light-duty vehicle emission standards set forth in section 202(b)(1)(A) of the Clean Air Act of 1970 (without regard to any suspension of such standards), shall be exempt from the requirements of this section.

§ 52.2447 Vacuum spark advance disconnect retrofit.

(a) Definitions:

(1) "Vacuum spark advance disconnect retrofit" means a device or system installed on a motor vehicle that prevents the ignition vacuum advance from operating either when the vehicle's transmission is in the lower gears, or when the vehicle is traveling be-

low a predetermined speed so as to achieve reduction in exhaust emissions of hydrocarbon and carbon monoxide from 1967 and earlier light-duty vehicles of at least 25 and 9 percent, respectively.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) All other terms used in this section that are defined in Part 51, Appendix N, are used herein with meanings so defined.

(b) This section is applicable within the Virginia portion of the National Capital Interstate AQCR.

(c) The Commonwealth of Virginia shall establish a retrofit program to ensure that on or before January 1, 1976, all light-duty vehicles of model years prior to 1968 registered in the area specified in paragraph (b) of this section are equipped with an appropriate vacuum spark advance disconnect retrofit device or other device, as approved by the Administrator, that will reduce exhaust emissions of hydrocarbons and carbon monoxide to the same extent as a vacuum spark advance disconnect retrofit. No later than February 1, 1974, the Commonwealth of Virginia shall submit to the Administrator a detailed compliance schedule showing the steps it will take to establish and enforce a retrofit program pursuant to this section including the text of statutory proposals, regulations, and enforcement procedures that the Commonwealth proposes for adoption. The compliance schedule shall also include a date by which the Commonwealth shall evaluate and approve devices

for use in this program. Such date shall be no later than September 30, 1974.

(d) No later than April 1, 1974, the Commonwealth shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Designation of an agency responsible for evaluating and approving devices for use on vehicles subject to this section.

(2) Designation of an agency responsible for ensuring that the provisions of paragraph (d)(3) of this section are enforced.

(3) Provisions for beginning the installation of the retrofit devices by January 1, 1975, and completing the installation of the devices on all vehicles subject to this section no later than January 1, 1976.

(4) A provision that starting no later than January 1, 1976, no vehicle for which retrofit is required under this section shall pass the annual emission tests provided for by § 52.2423 unless it has been first equipped with an approved vacuum spark advance disconnect retrofit device, or other device approved pursuant to this section, which the test has shown to be installed and operating correctly. The regulations shall include test procedures and failure criteria for implementing this provision.

(5) Methods and procedures for ensuring that those installing the retrofit devices have the training and ability to perform the needed tasks satisfactorily and have an adequate supply of retrofit components.

(6) Provision (apart from the requirements of any general program for periodic inspection and maintenance of vehicles) for emissions testing at the time of device installation, or some other positive assurance that the device is installed and operating correctly.

(e) After January 1, 1976, the Commonwealth shall not register or allow to operate on its streets or highways any light-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (d) of this section.

(f) After January 1, 1976, no owner of a vehicle subject to this section shall operate or allow the operation of any such vehicle that does not comply with the applicable standards and procedures implementing this section.

(g) The Commonwealth may exempt any class or category of vehicles from this section which the Commonwealth finds is rarely used on public streets and highways (such as classic or antique vehicles) or for which the Commonwealth demonstrates to the Administrator that vacuum spark advance disconnect devices or other devices approved pursuant to this section are not commercially available.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Oct. 28, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 74-1013

DISTRICT OF COLUMBIA, ETC., PETITIONER

v.

RUSSELL E. TRAIN, Administrator, Environmental Protection Agency and ENVIRONMENTAL PROTECTION AGENCY, ETC., RESPONDENTS

WASHINGTON, AREA BICYCLIST ASSOCIATION, INC., METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, INC., BREATHERS FOR THE REDUCTION OF ATMOSPHERIC HAZARDS TO THE ENVIRONMENT, INTERVENORS

No. 74-1575

THE COUNTY OF PRINCE WILLIAM, VIRGINIA, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1579

STATE OF MARYLAND, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, and ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1580

CITY OF FAIRFAX, VIRGINIA, A Municipal Corporation, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, and ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1581

CITY OF ALEXANDRIA, A Municipal Corporation

v.

RUSSELL E. TRAIN, Administrator, and ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1582

COMMONWEALTH OF VIRGINIA, EX REL. STATE AIR POLLUTION CONTROL BOARD, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, and ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Petitions for Review of an Order of the Environmental Protection Agency

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Before: MACKINNON and ROBB, Circuit Judges and CHRISTENSEN,* Senior United States District Judge for the District of Utah

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JUDGMENT

These causes came on to be heard on petitions for review of an order of the Environmental Protection Agency and were argued by counsel. On consideration of the foregoing, it is,

ORDERED AND ADJUDGED by this Court that the regulations are affirmed in part and the remainder are remanded to the Environmental Protection Agency for revision and further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: October 28, 1975

Opinion for the court filed by Circuit Judge MacKinnon.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI:

> * * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. Sections 101, 107, 109, 110, 113 and 302(e) of the Clean Air Act of 1967, 81 Stat. 485, as amended

by the Clean Air Act Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857 *et seq.*, as amended by Section 302, 85 Stat. 464 and Section 4 of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 256, provide in relevant part:

Section 101 (42 U.S.C. 1857)

Congressional findings; purposes of subchapter.

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public

health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Section 107 (42 U.S.C. 1857c-2)

Air quality control regions.

(a) Responsibility of State for air quality; submission of implementation plan.

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * * *

Section 109 (42 U.S.C. 1857c-4)

National primary and secondary ambient air quality standards; promulgation; procedure.

(a)(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard

and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this sec-

tion shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Section 110 (42 U.S.C. 1857c-5)

State implementation plans for national primary and secondary ambient air quality standards.

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan

implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as

may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the re-

vision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare

and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than

three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend

until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term 'parking surcharge regulation' means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term 'management of parking supply' shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term 'preferential bus/carpool lane' shall include any requirement for the setting aside of one or more lanes of a street or highway on a

permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement

such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision

complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D), of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307 (a) (relating to subpenas) shall be applicable to any proceeding under this subsection.

* * * * *

Section 113 (42 U.S.C. 1857c-8)

Federal enforcement procedures.

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or

he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards), 112(c) (relating to standards for hazardous emissions), or 119 (g) (relating to energy-related authorities), or is in violation of any requirement of section 114 (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or re-

quirement, or he may bring a civil action in accordance with subsection (b).

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of

a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g); or

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c), or section 119(g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of viola-

tion, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

* * * * *

Section 302 (42 U.S.C. 1857h)

Definitions.

When used in this chapter—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

* * * * *

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

* * * * *

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

III. 40 C.F.R. Part 52 provides in pertinent part:

§ 52.23 (as amended Sept. 18, 1974, 39 Fed. Reg. 33512)

Violation and Enforcement.

Failure to comply with any provisions of this part, or with any approved regulatory provision of a state implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required

to contain, or if the person or Governmental entity fails to comply with such schedule.

* * * * *

Subpart J—District of Columbia

§ 52.490 Inspection and maintenance program.

(a) Definition:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control-related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 lb GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with the meanings so defined.

(b) This section is applicable within the District of Columbia portion of the National Capital Interstate AQCR.

(c) In connection with the light duty vehicle inspection and maintenance program for the District of Columbia approved by the Administrator pursuant to § 52.472 the District shall establish an inspection and maintenance program applicable to all medium duty and heavy duty vehicles registered in the District that operate on public

streets or highways over which it has ownership or control. The District may exempt any class or category of vehicles that the District finds is rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the District shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all medium-duty and heavy-duty motor vehicles at periodic intervals not more than 1 year apart by means of a loaded emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive within two weeks the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. This enforcement program might include spot checks of idle adjustment and/or a suitable type

of physical tagging. This program shall include penalties for violation.

(5) Provisions for beginning the first inspection cycle by January 1, 1975, completing it by January 1, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After January 1, 1976, the District shall not register or allow to operate on public streets or highways any medium-duty or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After January 1, 1976, no owner of a medium-duty or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The District shall submit, no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section.

* * * * *

Subpart V—Maryland

* * * * *

§ 52.1089 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control-related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with the meanings so defined.

(b) This section is applicable within the Maryland portion of the National Capital Interstate AQCR.

(c) The State of Maryland shall establish an inspection and maintenance program applicable to all light-duty, medium-duty, and heavy-duty vehicles registered in the area specified in paragraph (b) of this section that operate on public streets or highways over which it has ownership or control. The State may exempt any class or category of vehicles that the State finds is rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the State shall submit legally

adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all light-duty, medium-duty, and heavy-duty motor vehicles at periodic intervals no more than 1 year apart by means of a loaded emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive within two weeks, the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. This enforcement program might include spot checks of idle adjustments and/or a suitable type of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspection cycle by August 1, 1975, and completing it by July 31, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After July 31, 1976, the State shall not register or allow to operate on public streets or highways any light-duty, medium-duty, or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After July 31, 1976, no owner of a light-duty, medium-duty, or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The State of Maryland shall submit no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including:

(1) The text of needed statutory proposals and regulations that it will propose for adoption.

(2) The date by which the State will recommend needed legislation to the State legislature.

(3) The date by which necessary equipment will be ordered.

(4) A signed statement from the Governor or his designee identifying the sources and amounts of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed legislation shall be submitted.

Subpart VV—Virginia

* * * * *

§ 52.2441 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 lb GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, are used herein with the meanings so defined.

(b) This section is applicable within the Virginia portion of the National Capital Interstate AQCR.

(c) In connection with the light-duty vehicle inspection and maintenance program for the area specified in paragraph (b) of this section approved by the Administrator pursuant to § 52.2423, the Commonwealth of Virginia shall establish an inspection and maintenance program applicable to all medium-duty and heavy-duty vehicles registered in any area specified in paragraph (b) of this section that operate on public streets or highways over which it has ownership

or control. The Commonwealth may exempt any class or category of vehicles that the Commonwealth finds is rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the Commonwealth shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all medium-duty and heavy-duty motor vehicles at periodic intervals no more than 1 year apart by means of an idle emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive, within two weeks, the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. This enforcement program might include spot checks of idle adjustments and/or a suitable type

of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspection cycle by January 1, 1975, and completing it by January 1, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After January 1, 1976, the Commonwealth shall not register or allow to operate on public streets or highways any medium-duty or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After January 1, 1976, no owner of a medium-duty or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The Commonwealth of Virginia shall submit, no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including:

(1) The text of needed statutory proposals and regulations that it will propose for adoption.

(2) The date by which the Commonwealth will recommend needed legislation to the legislature.

(3) The date by which necessary equipment will be ordered.

(4) A signed statement from the Governor or his designee identifying the sources and amounts of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed legislation shall be submitted.

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RESPONSE OF THE DISTRICT OF COLUMBIA TO THE PETITION FOR WRIT OF CERTIORARI OF THE UNITED STATES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1055

RUSSELL TRAIN, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DISTRICT OF COLUMBIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

RESPONSE OF THE DISTRICT OF COLUMBIA TO THE PETITION FOR WRIT OF CERTIORARI OF THE UNITED STATES

On January 26, 1976, the Solicitor General, on behalf of the Administrator of the Environmental Protection Agency filed a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-referenced cause.

OPINION BELOW

The opinion of the court of appeals is reported at 521 F.2d 971 and printed in full at App. A, 1a-125a of the appendix of the petitioner.

RESPONSE

On March 29, 1976 the Clerk of the Court informed counsel for the Respondent District of Columbia that the Court has requested that a response be filed in this case by the District. Accordingly, the District makes the following response.

As is noted in the petition of the United States, other petitions from similar cases arising in other Circuits are pending before the Court.[1] In addition the *Commonwealth of Virginia* also has filed a petition for a *writ of certiorari* in this case, seeking review of the opinion of the District of Columbia Circuit.[2] The District of Columbia has not joined in that petition.

It is the position of the District of Columbia that the decisions of the Circuit Courts of Appeals in *Brown* and *Maryland,* supra n. 1, support its position fully. However, this is an issue of great importance reaching as it does into the roots of the relationship between the states and the federal government.[3] The question presented is bound to reoccur as the Administrator seeks to impose requirements on the states to assure compliance with the standards established under the Act. The inspection maintenance and retrofit provision of the regulations[4] were remanded to the Agency for revision by the Circuit Court of Appeals. To date no new promulgation has been issued by the Agency. The District will await the new promulgation and will then determine whether to again seek review before the Circuit Court.

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[1] *EPA* v. *Brown,* No. 75-909 (9th Cir.); *EPA* v. *State of Maryland,* No. 75-960 (4th Cir.).

[2] *Commonwealth of Virginia Ex Rel State Air Pollution Control Board* v. *Train,* No. 75-1050.

[3] The Clean Air Act Amendments, 42 U.S.C. 1857h(d) provides that the District is a "state."

[4] The pertinent regulatory requirements challenged are set forth in full in the Appendix of the Circuit Court opinion in *District of Columbia* v. *Train,* —— U.S. App. D.C. at——, 521 F.2d at 999 *et seq.*

The petitioner has repeatedly relied on the opinion of the Third Circuit in *Pennsylvania* v. *EPA,* 500 F.2d 246 (3rd Cir. 1974), relative to the authority of the Administrator of EPA to direct the states to adopt particular laws at his direction. The District of Columbia Circuit rejected the reasoning of the Third Circuit[5] with respect to the implication that arises when a federal regulation seeks to compel the states to enforce federal regulatory programs in this fashion.

The opinions of the Fourth and Ninth Circuits conflict with the Third Circuit opinion. The position of the District in this matter is no less serious than for the states. It is not merely that the District is denominated as a state for purposes of the Act that is significant. Congress exercises complete plenary power over the District,[6] and, in the exercise of that power, has delegated certain of its authority to the government of the District of Columbia.[7] In so doing it has reserved certain powers. However, Congress did not delegate to the various federal agencies the authority to promulgate regulations for the District of Columbia without regard to the legislative authority delegated to the Council. The police power hitherto completely vested in Congress has been delegated in large degree to the Council of the District of Columbia.[8] It is the position of the District of Columbia that the petitioner has no more authority to direct the Council with respect to what laws it will adopt than it has to tell a state legislature what laws to adopt.

In view of the prolonged delays that have arisen in the implementation of the clean air program nationally, it is

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[5] District of Columbia v. Train, —— U.S. App. D.C. ——, 521 F.2d at 994.

[6] Art. I, § 8, cl. 17 Constitution of the United States; see, *e.g., District of Columbia* v. *Thompson Co.,* 346 U.S. 100 (1953); *District of Columbia* v. *Carter,* 409 U.S. 418 (1973).

[7] District of Columbia Self-Government and Governmental Reorganization Act of 1973, P.L. 93-198, 87 Stat. 774.

[8] *Id.* Subject to Congressional review and to certain reservations not relevant here.

apparent that the issues that have been presented before the various circuits should be decided by this Court in order to decisively define the responsibilities between the states and federal agencies and to insure uniformity in enforcement of the Act.

CONCLUSION

As the issues presented relate to the air quality problems of this region the District welcomes final review of the questions of state and federal authority and responsibility under the Act. The similar question with respect to plan-revisions under the Act arose among the circuits and required final resolution by the Court in *Train* v. *NRDC*, 421 U.S. 60 (1975). No less a need exists here to resolve issues of exceptional significance.

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IN THE

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RUSSELL TRAIN, Administrator,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

WASHINGTON AREA BICYCLIST ASSOCIATION, INC., METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, INC., BREATHERS FOR THE REDUCTION OF ATMOSPHERIC HAZARDS TO THE ENVIRONMENT,
Petitioners-Intervenors

v.

DISTRICT OF COLUMBIA, ET AL.

On Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

---

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DISTRICT OF COLUMBIA, ET AL.

On Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

---

BRIEF FOR PETITIONERS-INTERVENORS

OPINION BELOW

The opinion of the court of appeals is reported at 521 F. 2d 971.

JURISDICTION

The judgment of the court of appeals was entered on on October 28, 1975 (U.S. Pet. App. B, 126a-128a). The petition for writ of certiorari was filed on January 26, 1976 and was granted on June 1, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, upon a State's failure to adopt an implementation plan meeting the requirements of the Clean Air Act, the EPA Administrator has authority under the Act to require the State to reduce air pollution from sources owned and operated by the State.

2. Whether, if the Clean Air Act grants the EPA Administrator such statutory authority, the Act is in this respect a valid exercise of Congress' power under the Commerce Clause of the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

I. The pertinent provisions of the Constitution of the United States are Article I, Section 8, Clauses 3 and 18; Article IV, Section 4; Article VI; and the Tenth Amendment.

II. The relevant statute is the Clean Air Act, 42 U.S.C. § 1857 *et seq*; in particular Sections 110 and 113. Pertinent sections of the Act and the EPA regulations in issue are set forth in the Appendix to the Administrator's Petition for Certiorari (U.S. Pet. App. A, 59a-125a, and C, 129a-159a).

STATEMENT

In 1970 Congress amended the Clean Air Act to create a process for reducing air pollution throughout the United

States to levels which would protect human health and public welfare.[1] The Act requires the Administrator of the Environmental Protection Agency (EPA) to promulgate, after public comment, national ambient air quality standards adequate to protect against adverse health and welfare effects.[2] Section 110 of the Act specifies a process for establishing State programs to achieve and maintain the national ambient air quality standards. EPA is required to review the State programs, submitted to EPA as "State Implementation Plans," and to promulgate substitute Plans by Federal regulation for States whose Plans are not adequate. Section 110(a) and (c).

This Court has noted on several occasions, that in Section 110 Congress prescribed broad objectives to test the adequacy of State Implementation Plans, leaving to the States the specific choices as to how air pollution within their boundaries would be reduced. *Train* v. *Natural Resources Defense Council, Inc. (NRDC)* 421 U.S. 60, 79 (1975). *Union Electric Co.* v. *EPA*, 96 S. Ct. 2518, 2529 (1976). The principal requirement of Section 110 is that the State Implementation Plans achieve air quality protective of human health (primary ambient air quality standards) by 1975.

Although Section 110 requires that the State Plans be submitted by January 1972, EPA required submission only of partial Plans by this date and granted the States more time to devise programs to reduce motor vehicle pollution. Suit was brought to challenge this delay and EPA was ordered to direct the States to complete their Plan submissions and also was ordered to promulgate substitute Plans for States not submitting adequate Plans. *NRDC* v. *EPA*, 475 F.2d 968 (D.C. Cir. 1973).

---

[1] Act of December 31, 1970, P.L. 91-604, 84 Stat. 1676, *amending* 42 U.S.C. § 1857 *et seq*.

[2] Section 109, 42 U.S.C. § 1857-4. For the purpose of clarity, Section references to the Act will be used.

For various States which failed to submit adequate Plans EPA proposed substitute Plans and promulgated Plan regulations late in 1973. Some of the regulations EPA promulgated imposed duties upon States or their political subdivisions to manage the use of state-owned streets and highways by motor vehicles and to establish a program for emission inspection and maintenance of automobiles registered by the State for use on its roads. The States of Arizona, California, Maryland, Pennsylvania, Virginia and the District of Columbia, among others, petitioned in various U.S. Court of Appeals for review of EPA's actions pursuant to Section 307 of the Act. These States argued first, that § 113 did not authorize EPA to impose duties on States, and second, that if the Act did authorize such action, the Federal government lacked the constitutional power to do so.

The U.S. Court of Appeals for the Third Circuit ruled first, holding that the Clean Air Act authorizes EPA to promulgate regulations which imposed program implementation and enforcement duties on States and that the Act is constitutional. *Pennsylvania* v. *EPA*, 500 F.2d 246 (1974). The Ninth and Fourth Circuits ruled next. Those courts, in order to avoid a constitutional holding, interpreted the Act not to grant authority to promulgate and enforce against States the regulations in issue. *Brown* v. *EPA*, 521 F.2d 827 (1975). *Arizona* v. *EPA*, 521 F.2d 825 (1975). *Maryland* v. *EPA*, 530 F.2d 215 (1975). Subsequently, the District of Columbia Circuit decided that while the Act did not authorize EPA to require States to adopt legislation and regulations to establish pollution control programs, that the Act did authorize EPA to adopt such regulations itself and to require the States to enforce them. *District of Columbia* v. *Train*, 521 F.2d 971, 994 (1975). The D.C. Circuit then held that the commerce power authorized the federal government to require States to establish exclusive bus lanes on state-owned roads, to prohibit States from registering,

for use on state-owned roads, automobiles which do not conform to prescribed pollution control equipment and omission standards, and to require States to purchase buses to augment state-owned bus systems. 521 F.2d at 994. However, the Court further held that the commerce power did not permit the federal government to require States to establish and operate programs to inspect motor vehicles. 521 F.2d at 995.

In the face of the conflicting decisions this Court granted petitions for certiorari filed by the Commonwealth of Virginia and by EPA with respect to the cases involving Arizona, California, the District of Columbia, Maryland and Virginia.

SUMMARY OF ARGUMENT

The issue in this case is whether the Federal government may require a State which owns and operates a source of air pollution to act to reduce that pollution.[3] EPA has reasonably determined that highways used by motor vehicles are such sources of pollution. Duties imposed on a State as the owner and operator of these highways do not threaten the viability of the States as independent entities in our federal system.

The Clean Air Act, unlike the Fair Labor Standards Act, which was struck down with respect to the States in *National League of Cities* v. *Usery*, 96 S.Ct. 2465 (1976), does not displace critical State determinations nor does it apply to a wide range of integral governmental functions of the States. Rather, the Clean Air

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[3] This brief will not discuss the statutory holdings of the Fourth and Ninth Circuits. The statutory interpretations by these Courts conflict with both the plain meaning and the legislative history of the Clean Air Act. Since the arguments which we assume will be made in EPA's brief will readily demonstrate the errors of the Courts' statutory rulings this brief will not duplicate those arguments.

Act is designed to encourage free and independent exercise of State choices and the Federal government's exercise of power is authorized only when a State fails to choose its own programs adequate to protect public health. Moreover, the Act preserves the right of the State to replace federally-promulgated programs at any time with adequate programs of the State's own choosing. The Act and EPA's actions affect only one State activity—ownership and operation of highways. The limited federal regulation of this activity does not impair the State's ability to carry out its integral governmental functions.

Pollution crossing from one State to another adversely affects the interests of all the component parts of our federal system. If a State cannot be required to assume responsibility for its polluting activities that burden will be shifted either to the people or to sister States.

A grant of immunity to the States in this case would require the creation of a vast federal enforcement system to regulate motor vehicle operators individually. This result would threaten the nation's ability to achieve the important national objective of reducing hazards to health from air pollution.

ARGUMENT

I

The Clean Air Act Authorizes EPA to Require Road Owners and Operators to Manage Road Use to Reduce Pollution

The EPA regulations challenged in this case require owners and operators of streets and highways (hereafter, roads) first, to require certain vehicles which use their roads to be inspected for emissions and to be equipped with pollution control devices, second, to reserve one or two lanes of some roads for use by buses, and third, to increase existing bus fleets. These regulations require management of road use in order to reduce emissions resulting from the operation of the road. The road is a source of pollution and the owner/operator of the source is required to take certain steps to reduce pollution caused by the operation of that source.

In this section of the brief it will be shown that EPA has acted reasonably in placing duties on the owner/operator of a road to reduce pollution caused by road use. The next section of the brief will address the constitutional issues raised by the fact that the owner/operator is a State.

When EPA must act to promulgate regulations under Section 110(c) of the Act, following the failure of a State to submit an adequate Plan, EPA may require the owner/operator of a source to abate pollution resulting from the source. *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (CA 1, 1974). Roads and other facilities provided for motor vehicles, such as parking lots, are sources of pollution and their owners and operators may be required to control that pollution.[4] The First Circuit has held that the Act authorizes EPA to require owner/operators of parking facilities to reduce motor vehicle-related pollution. *South Terminal Corp.* v. *EPA*, *supra*. 504 F.2d at 668. Roads are simply another type of facility provided for the use of motor vehicles. The D.C. Circuit agreed with this principle in *D.C.* v. *Train*, 521 F.2d at 989.

Many States, including the Commonwealth of Virginia, have agreed with EPA that it is appropriate to assign responsibility to the owner/operator of roads and parking facilities for the pollution resulting from the use of such facilities. Virginia has adopted a regulation requiring the owner or operator of a road, parking lot, or other facility which attracts motor vehicle traffic to acquire

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[4] *See* 38 *Fed. Reg.* 30632, November 6, 1973.

a permit for construction of a new facility or expansion of an existing facility. If the air pollution resulting from the use of the facility would interfere with the ambient air quality standards, the facility may not be built.[5]

Federal and State laws routinely require the owner or operator of a facility to manage its use by others when such control is needed to protect the health, safety, or welfare of those users or other people. The Federal Safety Appliance Act makes any interstate railroad common carrier liable for a $250 penalty for "hauling *or permitting to be hauled* on its line" any car which does not have the mandatory safety device. 45 U.S.C. § 6 (1972) (emphasis added). A railroad is responsible for equipment violations on the cars of another railroad just as it is responsible for its own. *United States* v. *Toledo, Peoria I. Western R. Co.*, 280 F.Supp. 243 (N.D. Ind. 1968). Moreover, a railroad in its capacity as track owner is liable for the violations on another company's cars (even though it did not haul them) merely because it permitted the other company to haul them on its line. *United States* v. *Northwestern Pacific R. Co.*, 235 F. 965, 968-69 (N.D. Cal. 1916).

Under the Federal Aviation Act, an airline is required to prevent use of its planes by any passenger who refuses to be searched for dangerous weapons. 49 U.S.C. § 1511(a) (1974).[6]

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[5] Regulations for the Control and Abatement of Air Pollution, §§ 2.706(a)(2), 2.706(d), Virginia State Air Pollution Control Board, December 1974. Other States which have adopted regulations similar to Virginia's include Alabama, Connecticut, Florida, Idaho, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Hampsire, New York, North Carolina, Oregon, West Virginia, and Wisconsin. *See* generally, Bureau of National Affairs, *Environment Reporter, State Air Laws.*

[6] "The [FAA] Administrator shall, by regulation, require any air carrier . . . to refuse to transport—

(1) any person who does not consent to a search of his person . . . to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) any property of any person who does not consent to a search or inspection of such property to determine if it unlawfully contains a dangerous weapon, explosive, or other destructive substance."

In *Griggs* v. *Allegheny County* 369 U.S. 84 (1962), the Supreme Court held that the owner and operator of an airport is liable for the inverse condemnation of a residence made unlivable by the noise and vibration of planes approaching the airport's runways. The County, as "promoter, owner, and lessor" of the airport, was responsible for the planes' behavior because it gave the planes permission to take off and land and because it chose the location of the runways. *Id.* 87, 89.

State laws have long required the owner or operator of a tavern or a liquor store to prevent a minor from drinking on his premises, whether the minor brought the liquor with him or whether an adult purchased it there for him. An owner or operator who fails to meet these duties is often criminally liable. *See, e.g.*, Cal. Bus. I.P. Code § 25658; Ann. Code Md. Art. 2B, § 118(a) I(g).

More recently, States have enacted laws to require the owner or operator of a facility to prohibit or regulate smoking of tobacco on the premises. For example, Maryland laws require building owners to prohibit smoking in elevators and require bus carriers and operators of health care facilities to regulate smoking in their facilities.[7]

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[7] "The proprietor of a building containing any elevator whose use is available to the general public shall prohibit the smoking of tobacco products in that area." Ann. Code of Md. Art. 89, § 49C(A) (1975).

"The owner and operator of any interstate bus carrier shall prohibit the smoking of tobacco products while the bus is in public service." Ann. Code Md. Art. 78, § 35A(A) (1975).

"The director of every hospital, nursing home, health clinic, and physician's office shall devise, implement, and enforce a plan which

Thus, it is well established that duties may be placed on the owner or operator of a facility to regulate the use of that facility by others. The EPA regulations in issue in this case do not impose novel duties by regulating the owner/operator of the road. The regulations are examples of the broader area of regulatory and other law imposing responsibility on a property owner when the owner permits his property to be used by others in a manner which adversely affects public health or welfare.

II

The Clean Air Act May Constitutionally Require State Owners and Operators of Roads to Manage Such Roads to Reduce Pollution

A. *A State is Not Immune from All Regulation Under the Commerce Clause*

Prior to this Court's decision last term in *National League of Cities* v. *Usery*, 96 S.Ct. 2465 (1976) the apparent rule of law regarding State claims of immunity from commerce clause regulation was simply stated: the State was as subject to the regulation as any individual or corporation. *United States* v. *California* 297 U.S. 175 (1936); *Maryland* v. *Wirtz* 392 U.S. 183 (1968). However, the decision in *Usery, supra*, indicates that a majority of this Court no longer supports this broad rule.

In *Usery*, a majority of the Court struck down as infringing State sovereignty those portions of the Fair Labor Standards Act (FLSA)[8] which applied the Act's hour and wage provisions to State employees. The majority opinion analyzed the specific requirements of the

adequately protects the health of nonsmoking patients through the regulation of smoking products on the premises." Ann. Code Md. Art. 43, § 54I (1975).

[8] 29 U.S.C. § 201 *et seq.* (1976).

Act and the impact of those requirements on the States. The Court held that the provisions of the FLSA which fixed the minimum wages, maximum hours, and overtime wages to be paid to State employees, "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" and thus are not within the federal commerce power. *Usery*, 96 S.Ct. at 2474.

However, the Court did not suggest that all federal regulation of State activities would be viewed as outside the commerce power. Rather, the Court expressly reaffirmed commerce power regulation of State-owned rail transportation systems originally upheld in *United States* v. *California*, 297 U.S. 175 (1936), although the reasoning of the *California* decision was rejected. The Court also reaffirmed its decision in *Fry* v. *United States*, 421 U.S. 542 (1975), upholding a temporary freeze on the wages of State employees.

The majority opinion in *Usery* emphasized three factors: *direct displacement* of State determinations; the fact that the determinations in question related to *integral operations* of State programs; and the fact that the State activities were in *areas of traditional governmental functions*. In addition a fourth factor was considered in distinguishing the decision in *Fry, supra*, although not discussed in reaching the result in *Usery*: the importance of the specific federal interest asserted. *Usery* 96 S.Ct. at 2474.

Examination of the specific requirements of the FLSA discloses the features of that Act which disturbed the majority in *Usery*. First, Congress fixed specific levels for the employment terms covered by the legislation: a $1.90 an hour minimum wage, increasing to a $2.30 minimum by December 31, 1976;[9] a maximum regular work

[9] 29 U.S.C. § 206(b) (1976).

week of forty hours;[10] and a minimum overtime wage of one and one-half times the regular wage.[11] The Court apparently viewed congressional specification of these terms as directly displacing alternative State choices on wages and hours. Second, the employment terms covered by the Act—wages and hours—were central to the employer-employee relationship. Thus, the integral operations of the State's employment function were the subject of regulation. Third, the Act's requirements applied to almost every State employment category. Thus, the Act directly covered areas of State activity, such as "fire prevention, police protection, sanitation, public health, and parks and recreation," which the Court regarded as traditional governmental functions.

Thus, the FLSA imposed on the States requirements so specific that the States had no ability to choose among alternative methods of compliance; the only means of compliance permitted was strict adherence to the specific wage and hours terms selected by Congress. Further, the FLSA addressed the essential terms of the employer-employee relationship. Finally, the FLSA was essentially universal in its coverage of State areas of endeavor.

The following sections of this brief demonstrate that the Clean Air Act's features are so different from the FLSA that the intrusive impacts on State interests identified in *Usery* are not present in this case. As will be seen the Clean Air Act does not displace or restrict state choices; the Act does not impose any regulatory obligations on the State unless and until it is determined that the cumulative effects of regulatory programs applicable to private entities are insufficient to achieve the objectives of the Act; the obligations which may ultimately be imposed on the State are confined to the State's activity as owner and operator of roads; finally, the Act permits the State to reduce or avoid even these obligations if it chooses to shift additional responsibility for pollution reduction to the private sector.

[10] 29 U.S.C. § 207(a) (1976).

[11] *Ibid.*

B. *The Clean Air Act Does Not Displace State Choices*

Unlike the FLSA, the Clean Air Act does not impose specific substantive rules of conduct on the States. The FLSA established wage and hour standards which the States could not modify or avoid by choosing alternative programs. When Congress enacted the amendments to the FLSA which were challenged in *Usery*, *supra*, the States were left with almost no freedom to define their role in the federal program. The FLSA imposed an equal burden on all employers, public and private, with no opportunity for a State employer to shift or alter its share of the burden. No alternative save massive dismissal of State employees was available to a State which might wish to limit its obligations under the law. Even if it took such action the State would still be required to follow the federally specified wage and hour terms for its remaining employees.

In contrast, the Clean Air Act presumes that the State, not the federal government will select air pollution rules. The Act's recognition of the rights of the States to choose the means of pollution reduction enables the States to avoid any federal regulation of State activities and thereby preserves the ability of the States to structure their affairs.

Section 110 of the Clean Air Act, under which EPA has acted to adopt the regulation challenged herein, calls upon the States to choose the means to reduce air pollution so that the States rather than the federal government will control this important program. Broad criteria are set forth in Section 110(a)(2)(A)-(H) to provide a framework for EPA assessment of the adequacy of the

State's programs. However, as this Court has noted, this assessment is a limited one and does not authorize the federal government to substitute its choices for those made by the States. *Train* v. *NRDC*, 421 U.S. 60, 79 (1975). *Union Electric Co.* v. *Train*, 96 S.Ct. 2518, 2529 (1976).

Under Section 110 a State may choose the mix of emission reduction measures it feels best. If the State's program as a whole is adequate to attain the national air quality standards and the other essentially procedural criteria of Section 110 are met, EPA must approve the State's program:

> Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. *Train* v. *NRDC*, *supra*, 421 U.S. at 79, (emphasis in original).

As this quotation observes, another feature of the Act is that EPA is permitted to adopt specific pollution control rules under Section 110 *only* when a State has failed to submit an adequate plan of its own. Section 110(c). Thus, the Act does not supplant the exercise of State power. Rather, it provides supplementary federal power in the event that the State's exercise of power is inadequate.

In addition to designing the Clean Air Act to preserve State choices, Congress gave the States the opportunity to minimize regulation of their activities by giving the States the primary responsibility to allocate the emission reduction burden. The Act thus respects State activities by allowing the States to place emission limitations on private sources of pollution in preference to limitations on publicly-owned pollution sources. For example, while the use of roads contributes significantly to photochemical oxidant and other pollution, the Act does not force the States to implement specific programs exclusively directed to road use. First, the State may choose to require maximum reduction of pollutants from various stationary sources,[12] thereby reducing the need to control emissions resulting from road use.

Second, if reduction of road-use emissions *is* necessary to achieve the air quality standards, the Act calls for the States to choose the programs and methods to reduce such pollution.

When a State fails to submit an adequate plan EPA must act, as in this case, to adopt federal regulations setting forth a pollution control program in that State. This action, however, does not limit the prerogatives of the State to choose a mix of control programs different from EPA's.[13] The Act provides that at *any* time the

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[12] Hydrocarbon emissions react with other pollutants to form photochemical oxidants. *See State of Texas* v. *EPA*, 499 F.2d 289 (1974) *cert. denied*, 44 U.S.L.W. 3746, (June 29, 1976). Stationary sources contribute large amounts of hydrocarbons, causing violations of the photochemical oxidant air quality standard. For example, stationary sources in the San Francisco area are estimated by the State of California to contribute 48% of total hydrocarbon emissions in 1977. "The State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards, Revision 3", dated June 21, 1973, submitted July 25, 1973 (Table III-2).

[13] In fact, as noted below, most of the programs adopted by EPA in this case were proposed by the States, not chosen independently by EPA.

States may submit revisions to the currently effective plans, including EPA promulgated regulations. Section 110(a)(3). Thus, any of the States before this Court may select programs to substitute for those promulgated by EPA and, if the minimum requirements of Section 110 are met, EPA must approve the revision. *NRDC* v. *Train, supra; Union Electric* v. *Train, supra.*

It should also be noted that the Clean Air Act allows the States to assign partial responsibility for attaining and maintaining ambient air quality standards to the federal government. A State may petition EPA to develop federal emission standards for stationary pollution sources pursuant to Section 111 of the Act.[14] While such federal standards do not necessarily reduce existing emissions they minimize increases in emissions due to expansion of existing sources or construction of new sources and thus aid the State's program to attain and maintain air quality standards. Similarly, the States can petition EPA for more stringent emissions standards for new motor vehicles pursuant to Section 202 of the Act.[15] In addition, State emission limitations apply to federally-owned facilities in the State. Section 118.

Just as the Clean Air Act itself respects the States' right to select programs to reduce air pollution, in every possible instance EPA has adopted measures selected by the States themselves. In the Washington, D. C. Metropolitan Area, the States of Maryland, Virginia and the District of Columbia proposed specific programs for the

[14] EPA action on such petitions is subject to judicial review if the State is not satisfied with EPA's response. *See Oljato Chapter* v. *Train*, 515 F.2d 654, (D.C. Cir. 1975).

[15] While specific standards for light-duty vehicles (automobiles and light trucks) were fixed by Congress through model year 1976, EPA retains authority to adopt more stringent standards for such vehicles for later model years and has always possessed discretion to develop more stringent standards for other significant mobile sources such as trucks, buses, and motorcycles. Section 202(a).

construction of exclusive bus lanes, the expansion of the bus fleet, and the inspection of motor vehicles. (38 *Fed. Reg.* 33703 (December 6, 1973)) In completing the plan for the D.C. Area, EPA approved these States' program choices. 38 Fed. Reg. 33705-06 (December 6, 1973). Similarly, for the State of Arizona, EPA adopted programs proposed by the State for motor vehicle inspection and maintenance, installation of vehicle pollution control equipment ("retrofit devices"), and carpooling, 38 Fed. Reg. 33369-71 (December 3, 1973). In California, the EPA-promulgated automobile inspection and maintenance program was proposed by the State in the State Plan Revision 3 [16] and each of the EPA promulgated vehicle use (VMT) reduction strategies (express bus lanes, carpool matching, parking supply management, mass transit incentives, parking surcharges) was proposed by one or more of the State/local task forces of the California Department of Transportation. *See* 38 *Fed. Reg.* 31232 *et seq.* (November 12, 1973) at 31233, 31237, 31241-44.

The impact of EPA's actions on State choices is therefore similar to, but less pervasive than the impact of the wage-freeze program upheld in *Fry* v. *United States, supra.* In most instances the States, not EPA, have chosen the strategies which require action by the State to reduce emissions resulting from road use.[17]

[16] *Supra*, n. 12.

[17] The Commonwealth of Virginia implies that EPA chose to require Virginia to enable the purchase of 475 buses for the Washington Area. Virginia Petition for Certiorari at 11. This is incorrect. Virginia itself, along with Maryland and the District of Columbia, selected the bus purchase strategy and identified the number of buses to be added in the metropolitan area. 38 *Fed. Reg.* 33706 (December 6, 1973).

C. *The Clean Air Act Does Not Affect Integral Operations of Traditional State Governmental Functions*

In *Usery*, *supra*, the Court discussed the State activities subjected to federal regulation under the FLSA. Because of the breadth of the FLSA's definition of "employer," virtually all State activities were regulated. Accordingly, the Court did not have to analyze closely the concept of a "traditional governmental function." Rather, the Court's opinion simply listed examples of activities regarded as traditionally governmental: "fire prevention, police protection, sanitation, public health, and parks and recreation." 96 S.Ct. at 2474.

By way of contrary example, the Court reaffirmed the holding of *U.S.* v. *California*, *supra*, on the ground that operating a rail transportation system was not a traditional governmental function. *Usery*, *supra*, at 96 S.Ct. 2475, n. 18.

Unlike the FLSA, EPA's actions under the Clean Air Act affect only one area of State activity: the ownership and operation of a highway system designed and managed for use by motor vehicles. Applying the reasoning in *Usery*, this State activity cannot be regarded as an integral part of its governmental activity.

The Court in *Usery* appears to suggest a test which asks whether the State's continued existence as a viable governing body in the federal system depends on its ability to make decisions independent of federal dictates regarding the activity in question. Thus, the Court in *Usery* asked whether the wage and hour decisions of a State employer are "functions essential to separate and independent existence," quoting *Coyle* v. *Smith*, 221 U.S. 559, 580 (1911) and *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869). Citing *Fry* v. *United States*, 421 U.S. 542, 547 (1975), the Court referred to Congressional action which "impairs the States' integrity or their

ability to function effectively in a federal system . . . ." *Usery*, *supra*, at 96 S.Ct. 2470, 2474.[18]

When one employs the test of whether an activity is essential to the preservation of State government, it is not difficult to justify the result in *Usery*, once the principle is accepted that the federal commerce power is limited by the existence of such integral activities. It cannot be disputed that the employment of persons is a

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[18] No other test emerges from the majority's discussion in *Usery*. However, the use of the word "traditional" to describe the functions protected by the Court might give rise to an argument that a State activity which is initiated a "significant" number of years before federal regulation occurs should be immune from such regulation. Such a test should be rejected, for the length of time a State has engaged in a particular practice does not make the practice essential to preserve the viability of the State in the federal system. Moreover, such a test would create a constitutional doctrine of "adverse possession" wherein a State could alter the boundaries of the federal commerce power by acting in an area not presently regulated by Congress and, if Congress failed to enact legislation regarding the activity within a constitutionally "short" period of time, thereafter enjoy immunity from federal control of the activity.

In an era when many emerging technologies receive direct and indirect support from governmental bodies on all levels such an approach could cripple the power of the federal government to control State-supported technologies of the future whose use might endanger "the well-being of all the component parts of our federal system," *Usery*, *supra*, at 96 S.Ct. 2474. The development of nuclear energy has been promoted by the federal rather than State governments; but does the authority of the federal government to regulate State-owned nuclear power plants rest on that incident of history? Could a few score years of development work at State universities turn new technological activities, such as "genetic engineering," into traditional State governmental functions? Looking back in time one must ask whether actions by States at the turn of the 20th Century to provide, own, and operate systems of improved roads which permitted rapid expansion of motor vehicle use can be deemed integral governmental functions immune to federal control, simply because of the passage of time before Congress recognized the need for federal regulation. The answer to these questions must be no, because mere duration of action is neither a sufficient nor necessary element of sovereignty.

function essential to the preservation of State government, for without employees a State, indeed any institution, could not act. Nor is it difficult to accept that a State possesses much less control over its employment functions when wage and hour terms for State employees are fixed by another level of government.

In contrast to the result in *Usery*, it is very difficult to support a conclusion that State ownership and operation of highways is a function "essential to [States'] separate and independent existence." *Usery*, *supra*, at 96 S.Ct. at 2471. Undeniable State interests in the *governance* of highway systems are not pertinent since such interests can be protected by the State in the absence of State ownership and operation of the highways.[19]

The State may be interested in the existence of a good system of highways in order to facilitate commerce within the State. In addition the State has an obvious police power interest in regulating behavior on highways in the State. However, State ownership and operation of the highways is not essential to support these valid State interests.

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[19] The State is the subject of EPA's regulations because it is the owner/operator of the roads, not for any other reason. EPA does not seek to impose responsibility on the State simply because the State *regulates* the use of roads. This distinction between regulation and ownership was recognized but was misinterpreted by the Ninth Circuit in *Brown* v. *EPA*, *supra*:

> Nor do we believe that it is proper to equate the operation by a state of a railroad, an *economic activity* indistinguishable from that of private parties, with its *governance* of the use of highways and automobiles, an exercise of its police power with respect to commerce. 521 F.2d at 838 (citation omitted, emphasis in original).

The Ninth Circuit incorrectly assumed that EPA sought to regulate the States because of their *governance* of roads. That is incorrect; the State as *owner*, not as *regulator* of the road is the subject of EPA's regulations.

For example, other technological systems such as electric power systems and telephone systems are doubtless regarded as essential by the State; yet few States choose to own such systems. Rather, most States regulate the private owners of such systems through public utility commissions.

State regulation of highways and their users can also be accomplished without State ownership of the highways themselves. It is a commonplace that competent governments can exercise jurisdiction over all property within their territory without regard to its ownership. It is not questioned that the State has a strong and valid interest in regulating liquor stores and their patrons, yet this Court did not find State *ownership and operation* of liquor stores to be an essential function for purposes of intergovernmental tax immunity; *South Carolina* v. *United States*, 199 U.S. 437 (1905).

Most States implicitly recognize the distinction between ownership, operation, and regulation of highways by dividing these responsibilities between different agencies: typically the state police and department of motor vehicles for regulatory functions and a State highway or transportation department for construction and operation of the highways. *See*, *e.g.*, Code of Virginia, titles 33, 46.1, and 52.

Before the 20th Century when State ownership and operation of highway systems began to flourish, State regulation of roads without ownership was a common condition. In a continuation of the prevailing condition in the colonial period, provision of highways in the 18th and most of the 19th century was an activity carried on not by the States, but by local authorities using "statute labor" or by private turnpike corporations.[20] Between

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[20] Rae, J. B., *The Road and the Car in American Life* 12, 26 (MIT Press, Cambridge 1971).

1800 and 1850 most significant road-building was undertaken by private turnpike corporations.[21] The turnpikes constructed were noted by this Court as subject to State regulation even though they were not owned by the States.[22]

Until the turn of the 20th century, many States were prohibited by their constitutions from issuing bonds to build public works, including highway systems.[23] The first State to pass legislation empowering the State to aid the construction of highways was New Jersey in 1891.[24] It could hardly be argued that prior to acquiring and exercising their authority to build and operate highways that the States were less sovereign than they are today.

EPA's actions under the Clean Air Act focus on a particular transportation system—motor vehicles and the improved highways provided for their use. It is appropriate to examine further the State role in the development of this distinct and relatively recent technological system. The emergence of the automobile, the development of materials suitable for building substantial mileage of

[21] Rae, *supra*, at 18. From 1850 to 1900 little road-building of any sort occurred due to the pre-eminence of the railroad. *Ibid.* at 20.

[22] *Gibbons* v. *Ogden*, 9 Wheat. (21 U.S.) 1, 203 (1824).

[23] As late as 1913 the constitutions of the following twenty-one of the forty-eight States prohibited the issuance of bonds for public works: Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Louisiana, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin. U.S. Congress, Joint Committee on Federal Aid in the Construction of Post Roads, "Federal Aid to Good Roads," Committee Print, April 25, 1913, at 16. *See also*, American Public Works Association, *History of Public Works in the United States 1776-1976* at 65-66 (1976).

[24] Young, F. G., "Tendencies in Recent American Road Legislation," 2 U. of Oregon Bulletin 2, 16 (1905). *See also, History of Public Works in the United States, supra*, n. 23, at 70.

hard-surfaced roads conducive to motor vehicle use and the revolutionary changes in State policies from a condition of inaction to one of organized promotion of highway construction—all these events occurred during the three decades between 1890-1920.[25] In upholding Maryland's law requiring motor vehicle owners to register their cars and to pay a fee to the State this Court recognized the interdependence of road building and motor vehicle use, the recent expansion of State activities to include building improved roads, and the proprietary interest of the State in the "special facilities" it was providing the motor vehicle operator:

> "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways . . . . A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious." *Hendrick* v. *Maryland*, 235 U.S. 610, 622 (1915).[26]

[25] *History of Public Works in the United States, supra*, n. 23, at 66-70, 73, 74; Dearing, C. L., *American Highway Policy*, 45-58 (Brookings, 1942).

[26] In *Kane* v. *New Jersey*, 242 U.S. 160 (1916), Justice Brandeis emphasized the proprietary basis of the *Hendrick* decision. Quoting from *Hendrick* he concluded:

> "And it was expressly recognized that the purpose of the Maryland law 'was to secure some compensation for the use

State courts also recognized the novelty of the State activities in the highway area. *See, e.g., Saviers* v. *Smith*, 101 Ohio St. 132, 128 N.E. 269, 271 (1920):

> "It is within the common knowledge, and the court will take judicial notice of the entirely new use to which the roads of the country have been put within a comparatively few years, as well as of the enormous number of motor vehicles and the vast traffic conducted by means of them upon our highways . . . . More and more it becomes one of the important instrumentalities in in the conduct of the commerce and trade of the country. Moreover, by common consent there has been a general tendency to the construction of roads of a quality and character vastly superior to those which were constructed prior to the coming of the automobile."

The Court's discussion of the highway function in *Hendrick* v. *Maryland, supra,* suggests that highway building and ownership was recognized as a recent phenomenon and not viewed as purely governmental. This Court has never been called upon to decide whether highway ownership was an essential governmental function for purposes of federal tax immunity. However, the Court has not held other types of State-owned transportation systems essential to "safeguard the necessary independence of the State." *Helvering* v. *Powers*, 293 U.S. 214, 227 (1934) (street railway).[27] The State activity found to be non-

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of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.'" 242 U.S. at 169.

The State of Maryland and other States have enjoyed the benefits of their proprietorship of highways for some 60 years. It would be inappropriate for them to claim that their highway activity is exclusively governmental and thus immune from federal control now that the federal government simply seeks to apply to the States some of the responsibilities of proprietorship.

[27] *See also, Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 172 (1911); and this Court's discussion in *Usery, supra,* at 96 S.Ct. 2475, n. 18, of the result in *United States* v. *California, supra.*

essential in *Helvering* v. *Powers, supra,*—operation of a street railway—was brought about by another state activity only slightly less recent: the provision of improved highways for motor vehicles, whose success soon drove privately-owned street railways into bankruptcy, compelling public acquisition.[28]

These considerations demonstrate that the State activity to which the federal regulation is directed—ownership and operation of highways—is not integral to the performance of essential governmental functions of the States.

D. *States Must Be Responsible For Their Polluting Activities to Protect Strong Interests of the Federal System*

Vehicular air pollution in the United States threatens public health, crosses State boundaries, and requires a combination of actions which cannot be accomplished through exclusive action by one level of government.

A substantial proportion of the population of the United States is regularly exposed to air pollution levels which greatly exceed national air quality standards established to protect public health. Photochemical oxidant pollution reaching two and three times the primary health standard is not an uncommon occurrence throughout the country, including the States before this Court.[29]

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[28] *History of Public Works in the United States, supra* n. 23, at 177.

[29] The National Ambient Air Quality Standard for photochemical oxidants is 160 micrograms per cubic meter (ug/m³) for 1 hour. 40 C.F.R. § 50.9. In 1973, oxidant levels in California exceeded 400, 600 and sometimes 800 ug/m³ in a number of areas. In Fairfax County, Virginia, oxidant readings of 520 ug/m³ were recorded in 1973. In Phoenix, Arizona oxidant levels reached 450 ug/m³. In Baltimore, Maryland, levels of 490 ug/m³ were recorded and in the National Capital Area (DC-Md.-Va.) oxidant levels exceeded 800 ug/m³ at a Bethesda monitoring station. U.S. EPA, Office of Air Quality Planning and Standards, *Monitoring and Air Quality Trends Report, 1973*, EPA-450/1-74-007 (October 1974), Table D-1.

Moreover, pollution generated within one State does not remain there. Polluted air often travels hundreds of miles, crossing from the State of origin to sister States "downwind." [30] For example, recent studies show that a large portion of the pollution burden suffered by Connecticut and Massachusetts has traveled from New York and New Jersey.[31]

The population of the United States is distributed in a fashion that places a large percentage of the nation's people close to State borders. Over 110 million people live in major metropolitan areas located within 75 miles of a State border.[32] Thus, over 50% of the American people live in areas where they may be affected by polluted air not only from their own State but also from neighboring States.

In theory citizens can affect the policies and practices of their own State regarding air pollution from highway use by exercising their right to vote. However, such citizens have no representation in neighboring States whose programs relating to highway use may generate pollution which affects the health and welfare of such citizens. Given the evidence of interstate pollution problems available before and since the passage of the Clean Air Amendments of 1970, this impact on out-of-State populations is not merely conjectural.

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[30] Martinez and Meyer, "Urban-Nonurban Ozone Gradients and their Significance," Air Pollution Control Association, *Proceedings, Conference on Ozone/Oxidants—Interactions with the Total Environment* (1976) at 221.

[31] *Id.* at 225-6. Cleveland, W. S., *et al.*, "The Analysis of the Ozone Problem in the Northeast United States," *Proceedings, supra*, n. 30, at 109-120.

[32] Calculated from U.S. Office of Management and Budget, *Standard Metropolitan Statistical Areas* (rev. ed. 1975) and U.S. Department of Commerce, "Standard Metropolitan Statistical Areas defined by Office of Management and Budget, January 1, 1974," United States Maps, GE-50, No. 55.

This situation points up a basic difference between the impact of non-compliance by a State with the Clean Air Act and the impact of State non-compliance with the FLSA considered in *Usery*. If a State declines to pay the minimum wages prescribed by the FLSA any injury will be confined to that State's employees; neither the residents of the State in general, nor a sister State nor its residents will be adversely affected. In fact, the most likely effect on a sister State will be beneficial, since the sister State can either reduce its wage scales to the levels of the "non-complying" State or enjoy a competitive advantage in recruiting employees by paying higher wages in any categories where labor demand exceeds supply.

In contrast, a State which fails to control pollution from motor vehicle use can injure not only its own citizens but also the sister States whose borders its pollution crosses and the citizens of those States. A "downwind" State lying in the path of pollution from a State which refuses to control highway use may be injured in several ways. First, if the "downwind" State does nothing, the health and welfare of its citizens may be threatened by that pollution. Second, if the "downwind" State does act to reduce the pollution it receives, it is being forced to spend its tax dollars to solve a problem created in another State. Third, if the "downwind" State relies on direct action by the federal government to reduce the pollution it receives, its residents and those of other States, through their federal income tax payments, will be forced to contribute to a program to reduce pollution caused by another State's activity.

Therefore, unlike the facts in *Usery*, here the ability of the federal government to require compliance with the Act's requirements is necessary to prevent one State by its actions from injuring other States. In this case the assertion of complete immunity by one State diminishes the rights not only of the federal government, it would also infringe the rights of sister States.

Finally, the impact on the federal government of having to directly regulate motor vehicle use in each State should be examined and compared to the impact on the States of carrying out the EPA regulations themselves. The requirements for inspection of vehicles and establishment of exclusive bus lanes create a need for enforcement machinery to check compliance by individual motorists. The impact on the States of assuming these functions is small because they have an adequate enforcement system already in existence, namely their motor vehicle registration systems and their State and local traffic enforcement forces.

To ensure compliance with the inspection program the State need only add a condition to its existing vehicle registration procedure requiring that inspection of the vehicle have occurred. With respect to the exclusive bus lane strategy, existing State traffic forces which patrol the highways would acquire an added responsibility of preventing unauthorized use of the lanes by motorists. The States have failed to show that this added responsibility would impair the ability of these forces to carry out their existing duties.

If the federal government must establish its own forces to enforce requirements against each motorist the citizens of this country will either be left with dirty air or a substantially higher federal tax bill. Unlike the States the federal government does not have existing enforcement resources. If, as Virginia suggests,[33] a separate sticker system for inspection programs were required, the federal government would have to duplicate the resources of the State's motor vehicle registration system in each State where such a program is required. In addition, the federal government would have to establish duplicative highway patrol forces to check vehicles for inspection

[33] Virginia Petition for Certiorari at 7.

stickers and to enforce bus lane restrictions. Establishing these forces would involve hiring large numbers of personnel, patrol cars, office buildings, records systems and additional sets of government forms for motorists to complete. All of these resources would duplicate what the States already possess and would impose a large and avoidable expense on all taxpayers.

We fear that the result of a finding of State immunity in this case would not be confined to a waste of taxpayers' dollars. The impasse which has existed for the past four years with no action by either the federal or the States' governments will continue for the forseeable future if EPA's actions are found unconstitutional. The result will be additional years of exposure to harmful pollution levels for millions of people who need the protection of their government but witness quarrels instead. We do not believe that the State's decisions to own and operate highways for polluting vehicles are so essential to their continued "separate and independent existence" that immunity must be found in the face of the adverse consequences of such a finding.

The vehicular pollution control programs addressed by EPA's regulations in these cases require significant changes in transportation habits. States have been reluctant to make these changes in the past. We believe that this reluctance will continue unless each State is convinced that other States with similar pollution problems will make equal efforts to clean the air. The actions of the federal government which are challenged in these cases help to assure each State that the necessary efforts will be made by all States with severe pollution problems.

CONCLUSION

Our discussion has shown that the Clean Air Act does not intrude on the State's essential sovereign functions. The Act sets broad public health objectives and does not

displace State choices as to how to achieve those objectives. The Act imposes duties on the States only as a last resort, only where the States operate polluting sources, and only until the States propose some alternative action to reduce overall pollution to levels protecting public health.

The Commonwealth of Virginia has stated, "Power without responsibility produces an unhealthy situation, whether in the private or the public sector." [34] We agree. The States have exercised power to build and operate roads and have not assumed responsibility for the resulting pollution. They have allowed a literally unhealthy situation to develop; a situation which will continue as long as the States avoid their responsibility.

This Court has recognized that the Tenth Amendment is an express declaration of constitutional policies protecting the State's rights to continued existence. *Fry* v. *United States*, *supra*. Yet the Tenth Amendment also recognizes the rights of the people of the United States. The interests of the people in breathing air which does not damage their health will be impaired if the States may not be held responsible for their polluting activities. The Constitution need not be construed to endorse allegations of State sovereignty which are made at the expense of the people's health.

Accordingly, it is suggested that this Court reverse the decisions of the Ninth and Fourth Circuits below and reverse in part the decision of the District of Columbia Circuit below.

Respectfully submitted,

DAVID G. HAWKINS
Attorney for Petitioners-Intervenors

September 1976

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[34] Virginia Petition for Certiorari at 15.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1055

RUSSELL TRAIN, Administrator,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

WASHINGTON AREA BICYCLIST ASSOCIATION, INC., METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, INC., BREATHERS FOR THE REDUCTION OF ATMOSPHERIC HAZARDS TO THE ENVIRONMENT,
Petitioners-Intervenors

v.

DISTRICT OF COLUMBIA, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS-INTERVENORS

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS-INTERVENORS

ARGUMENT

I. EPA's Basis for Regulation is Ownership of Highways by States, and Not Their Failure to Regulate Private Parties.

The States of Arizona, California and Maryland, the Commonwealth of Virginia and the District of Columbia

(hereafter "the States") ask this Court to hold invalid regulations of the United States Environmental Protection Agency (EPA) which require the States to take certain actions to reduce air pollution resulting from the use of motor vehicles on highways owned and operated by the States. However, the States concede that Congress intended, in the Clean Air Act, that State-owned sources of pollution be regulated in the same manner as private sources of pollution [1] and the States do not question the constitutionality of this decision by Congress. Thus, the basic issues in this litigation are whether EPA's determination that a highway is a source of air pollution is a reasonable interpretation of the Clean Air Act and whether the Act, so interpreted, offends the Constitution.[2]

[1] Brief for the States at 34, 38 n.61.

[2] The City of New York has submitted an *amicus curiae* brief in this case which suggests that a case now pending in the Second Circuit involving the City of New York bears a relationship to the instant case. The suggestion is wrong.

In the Second Circuit case, citizen plaintiffs sued, pursuant to § 304 of the Clean Air Act, to enforce a transportation control plan adopted by the State, approved by the Administrator, and ratified by the court. *Friends of the Earth* v. *EPA*, 499 F.2d 1118 (2d Cir. 1974). The Second Circuit has upheld plaintiffs' claim. *Friends of the Earth* v. *Carey*, 535 F.2d 165 (2d Cir. 1976). On remand from the 1976 decision, the District Court suggested that there may be constitutional infirmities to enforcement as ordered by the Second Circuit, and, to avoid such constitutional issues, in effect reversed the Second Circuit's interpretation of the Clean Air Act. *Friends of the Earth* v. *Carey*, —— F. Supp. ——, 9 E.R.C. 1007 (S.D.N.Y. 1976). Plaintiffs thereupon, in August 1976, petitioned for a writ of mandamus and moved for summary reversal. The Second Circuit by order in September, 1976, took the matter under advisement, received briefs from all parties, and is now considering its decision.

The City's *amicus* brief submitted in this Court is virtually identical to its main brief in the matter now pending in the Second Circuit. That explains why the *amicus* brief is, for the most part, unresponsive to the issues in this case. (The Natural Resources Defense Council is a plaintiff in the Second Circuit case and could, on request, provide copies of its briefs responding to the City's brief.) The cases are wholly dissimilar. First, in the Second Circuit case, EPA merely approved the State's own plan pursuant

The States avoid a direct argument that it is not reasonable to regard a highway as a source of air pollution. Rather, the States simply assert that EPA's conclusion is "an empty fiction." [3] Inspired by the strength of this assertion the States replace EPA's stated basis for regulation with a principle of their own formulation: "the failure of the States to enact and enforce laws and regulations to reduce air pollution from privately owned motor vehicles is the 'pollution creating activity' subject to federal regulation." [4] Then the States proceed to attack their own formula rather than EPA's stated rationale. This joust with a straw man does not aid the Court in resolving this case.

The facts belie the States' claim that EPA's rationale is a fiction. The statement that a highway is a source of pollution is no *post hoc* invention of counsel. It was a conclusion reached by EPA during its rulemaking process

to Section 110(a) and did not promulgate *any* regulations under Section 110(c) requiring the State to act. Second, in the cases before this Court, States, not political subdivisions, are challenging EPA's authority. In the Second Circuit case the State of New York has not only refused to challenge the constitutionality of the plan or its enforcement (its own plan, in any event), it has further stated that it will follow the provisions of the Clean Air Act by complying with its existing plan under court order or a revised plan. The City, however, disagrees with the State of New York's position and the State's plan. Thus, the Second Circuit case raises issues fundamentally different from the instant case.

The City's brief also misleads the Court in asserting that implementation of the plan would be a drain on the City's treasury. (City Br. at 2, 3). The City has never supported this claim with facts nor can it do so because many of the plan's strategies are self-supporting and others actually generate revenues. For example, the strategy to toll those bridges entering Manhattan which are still untolled was designed to raise net revenues close to $200 million annually. For another example, the strategy requiring enforcement of traffic regulations also is a revenue raiser through ticketing of illegally parked cars.

[3] Brief for the States at 57.

[4] *Ibid.* See also, *Id.* at 16, 38.

and explicitly stated when the regulations in question were promulgated (38 *Fed. Reg.* 30632-30633, November 6, 1973).[5] As noted in the Intervenors' opening brief in this case, a number of States themselves, including the Commonwealth of Virginia, recognize that a highway is a source of air pollution.[6]

In addition, EPA's actions demonstrate that the Agency has not lighted upon the States' ownership of highways as a device to force the States to regulate private polluters. If, as the States assert, EPA's real intent in promulgating implementation plan regulations were to "commandeer the police power of the States"[7] whenever a State failed to regulate a private source of pollution, one would expect to find duties imposed on the States in EPA regulations covering sources of pollution other than highways. However, in all such instances EPA's regulations apply to the source owner and do not require action by the State. For example, see EPA's regulations applicable to gasoline stations and dry cleaning plants in Maryland [40 CFR 52.1087, 52.1088; (A. 665-668)].[8] Only when the State owns the source of pollution, as in the case of highways, have EPA's regulations required action by the State. Thus, EPA's position that the highway is a source of pollution is no fiction and it deserves a fair consideration on the merits.[9]

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[5] See Brief for the Federal Parties at 23 (A. 435) for the text of this statement.

[6] Brief for Petitioners-Intervenors at 7-8 n. 5.

[7] Brief for the States at 28.

[8] See also EPA regulations applicable to smelting operations in various States; e.g., Idaho: 40 CFR 52.676.

[9] In the opinions below in this litigation only the D.C. Circuit dealt on the merits with EPA's determination that a highway is a source of pollution and that court agreed with EPA's determination. *District of Columbia* v. *Train*, 521 F.2d 971, 989 (D.C. Cir. 1975).

EPA's basis for regulation is not a theory that "knows no rational bounds" nor a theory that would permit the federal government to require State regulation of private stationary sources of pollution.[10] EPA argues only that sources *owned* by the State may be required to be controlled by the State. State-owned highways are one such source. Private stationary sources are not such sources and, in fact, as just noted, when private stationary sources require control EPA has regulated them and has not required State action.

II. EPA's Conclusion That a Highway is a Source of Pollution is Reasonable.

The State's position is, in essence, that the federal government is powerless to hold the States responsible in any way for air pollution resulting from the use of highways owned by the States. However, the States cite no decision of this Court nor any other authority supporting the proposition that it is unreasonable to regard a highway as a source of air pollution or to hold the owner of a highway responsible for the pollution resulting from its use.[11]

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[10] Brief for the States at 44.

[11] The States' arguments concerning congressional intent under the Clean Air Act are reducible to the claim that Congress could not have intended that States be held responsible for highway pollution because there are no explicit statements in the legislative history accompanying the 1970 Amendments that EPA may take enforcement actions against State officials. This claim is without merit. Congress explicitly provided EPA with authority to promulgate regulations reducing pollution from sources in States with inadequate plans. Section 110(c). By its terms Section 113 authorizes enforcement actions against the owners of sources which fail to comply with such regulations. The States do not cite any provision of the Act nor any item of legislative history which suggests that it is unreasonable to regard highways as sources of pollution. There is, however, ample legislative history explicitly recognizing the need to regulate highway use in order to attain ambient air quality standards. See Brief for the Federal Parties at 32-33 n.26. Moreover, in highway legislation enacted the same

A highway is a piece of property. A tenet of black letter law is that when an owner of property invites third persons to engage in certain activities on his property he may be held responsible for the harmful effects of such activities.[12] EPA's conclusion that a highway owner may be held responsible for the pollution of those using the highway simply recognizes this principle. In their opening briefs EPA and the Intervenors cited a number of decisions by this Court and other courts which upheld this principle.[13] The State's contention that these authorities are distinguishable because the extent of the Commerce Power was not in issue, is misplaced. EPA and the Intervenors rely on these authorities to support the proposition that governmental entities which own properties used by third persons may be held responsible for damages resulting from the use. These authorities clearly support this principle and thus confirm the reasonableness of holding the highway owner responsible for reducing pollution resulting from highway use.

In commenting on *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962),[14] the States ignore the fact that that

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day as the Clean Air Amendments of 1970, Congress explicitly recognized that highway operation could conflict with the mandates of the Clean Air Act and it directed the Secretary of Transportation to promulgate regulations to insure that highways constructed with federal aid would be consistent with air quality implementation plans under the Clean Air Act. 23 U.S.C. § 109(j). Finally, Congress did act after EPA promulgated its regulations herein to remove EPA's authority to impose *some* transportation controls, to wit, surcharges on parking. However, as EPA's Brief points out, Congress deliberately refrained from repealing EPA's authority for its regulations requiring actions by the States as owners of highways. See Brief for the Federal Parties at 33-36.

[12] See, e.g., 65 C.J.S. Negligence § 92 at p. 1044.

[13] Brief for the Federal Parties at 25-26. Brief for Petitioners-Intervenors at 7-10.

[14] Brief for the States at 43.

case held a governmental entity responsible for the noise pollution caused by third parties' use of a government-owned transportation facility. Under the rule of *Griggs* persons living near a highway would be able to hold the highway owner responsible for injury caused by noise and air pollution resulting from use of the highway.

Similarly, the States misrepresent the import of *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972).[15] In declining to accept that case on the merits under its original jurisdiction, this Court of necessity found that a cause of action was available in federal district court against a governmental body which discharged the sewage pollution of the public to the detriment of a neighboring State. Contrary to the States' assertion, this Court did not "treat only the narrow federal jurisdictional issue."[16] The opinion in *City of Milwaukee* also discusses at some length federal common law as the rule of decision for cases which are brought. Significantly, at the close of its opinion this Court explicitly rejected the contention that a State or municipality might assert sovereign immunity to avoid responsibility for its discharge of the public's sewage: "While the kind of equitable relief to be accorded lies in the discretion of the chancellor [citation omitted], a State that causes a public nuisance is suable in this Court . . .". 406 U.S. at 108 n.10.

In *City of Milwaukee* this Court referred to the line of cases beginning with *Missouri* v. *Illinois*, 180 U.S. 208 (1901), which established the rule that a government may be held responsible for the sewage pollution resulting from the use of government facilities by members of the public. In a subsequent case involving sewage discharges by the State of New Jersey, this Court confirmed

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[15] *Id.* at 43-44.

[16] *Id.* at 43.

the power of the federal government to require New Jersey to treat its sewage prior to discharge. *New York* v. *New Jersey*, 256 U.S. 296 (1921). In this case the federal government intervened on its own behalf in an original suit brought by New York against New Jersey. A stipulation obligating the State of New Jersey, through an authorized agency, to treat its sewage was entered into by the United States and the New Jersey agency. It was argued that the stipulation was invalid for want of power on the part of the United States. This Court held that under the "large powers of the Government over navigation and commerce" as well as under its property power, the federal government had the power to sue the State of New Jersey and to settle that suit by a stipulation requiring New Jersey to reduce its sewage pollution. 256 U.S. at 308.

There is no distinction between the water pollution discharges from State sewers and the air pollution discharges from State highways. In each case the State constructs a facility which has the effect of collecting, along an artificial artery, pollutants generated by individual members of the public. In each case it is the concentration of many sources of pollution within a public facility which creates a pollution problem of greater severity. This latter point applies with particular strength to highways. A highway, unlike a sewer, is not simply a channel for pollution which would have occurred anyway. A highway and the system of highways are the necessary preconditions to the very existence of our present motor vehicle pollution problems. The provision of highways by the States has made it possible for the number of vehicles and the frequency of their use to grow to a point where the total volume of pollutants generated has become a hazard to public health.

Thus, we believe that the decisions of this Court in *Griggs* v. *Allegheny County*, *supra*, and in the line of

sewage discharge cases beginning with *Missouri* v. *Illinois*, *supra*, clearly support the propriety under the Clean Air Act and under the Constitution of EPA's position that a highway is a source of pollution and that the owner of the highway may be held responsible for reducing the pollution resulting from its use.

If, on the contrary, this Court were to hold that considerations of State sovereignty prevented the federal government from imposing duties on the States on this basis, then the vitality of *Missouri* v. *Illinois*, *supra*, and subsequent cases would be put in serious question. If the federal government is prevented by State sovereignty from holding a State responsible for the polluting effects of State facilities, then how could one State overcome the same claim of sovereignty in an original suit in this Court against an adjacent polluting State?

To hold that the federal government may not require a State to reduce pollution from its highways would surely mean that one State could not seek relief in this Court against an adjacent State to protect its citizens from injury due to pollution generated on the highways of that adjacent State. Yet this Court has frequently recognized that among the sovereign rights which remained with each State after it joined the union was the right to protect its air and water from unreasonable pollution by the acts of persons beyond its control, whether such persons be private parties, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237-238 (1907), or sister States. *Missouri* v. *Illinois*, *supra*, 180 U.S. at 241; *North Dakota* v. *Minnesota*, 263 U.S. 365, 373-374 (1923).

This case involves claims of competing rights of a sovereign nature just as it would if it were a suit between two States where one State was seeking to require a sister State to reduce pollution generated by its highways. If this Court concludes that the rights claimed by

the States in this case are superior to those claimed by the federal government then the right of each State to generate air pollution will be elevated to a position superior to that of the right of any State (or the union of States) to be free from harmful levels of air pollution. We believe this result would be an inappropriate interpretation of a Constitution whose purpose is, in part, to "promote the general Welfare."

III. The Public's Use of the States' Highways Does Not Eliminate the Responsibility of the States as Owners of the Highways.

The States argue that EPA can regulate automobile drivers directly and thus it is unnecessary and improper to regulate the States as the owners of the highway facilities which the drivers use. However, to accept this principle would immunize a great many actions by States from regulation by Congress under the Commerce Power. The States' apparent position is that where, in any State facility, acts by members of the public contribute to the burden on commerce, that Congress may proceed only against the individuals and cannot impose duties on the State as the owner of the facility. Thus, a State could presumably own and operate a public race course for automobiles, motorcycles, snowmobiles, etc., and if federal air or noise pollution limits were exceeded the federal government's only remedy would be to regulate the individual users of the course. Similarly, States could locate airports in areas where flights would interfere with flight patterns supervised by the federal government with complete State immunity from federal regulation. A decision by a State to purchase land and invite its citizens to use that land to burn their refuse would apparently not be subject to regulation by the federal government.[17] One can think of many other examples of

[17] As a corollary to this line of reasoning a sister State which objected to such a trash-burning "park" located just within the borders of an adjacent State presumably could not seek relief against the adjacent State in this Court because of the availability of the remedy of suits against each of the individual trash-burners.

facilities on whose owner, whether a State or a private party, the government ought to be able to impose duties but could not under the State's line of argument: for example, bars serving alcoholic beverages; gambling establishments; parks for mobile homes (and their attendant sewage); hunting and target-shooting areas. We believe the States would reject any claims by a private proprietor of any of these facilities that it was unreasonable for a State to regulate him because the State could regulate his patrons instead. The argument possess no greater vitality simply because the State is the owner.

In addition, the States' argument in this vein is objectionable because of their very direct role as builders and owners of highways in determining how many vehicles are able to operate simultaneously within their borders. If the federal government were to regulate each vehicle directly the magnitude of its task and the resources it must devote to that task would be determined principally by the number of vehicles it would be required to regulate. As the owners of highways the States are free to undertake projects which can significantly increase the number of vehicles operating in given areas. For example, many States, including Virginia and the District of Columbia, make some or all lanes of major arterial highways in metropolitan areas one-way during "rush hours" in order to permit more commuter automobiles to enter and leave the city each day. Over longer periods of time States permit and encourage increases in the number of motor vehicles by building major new highways. Thus, the State governments by these actions can cause increases in traffic and thereby significantly increase the administrative burden and cost of regulating that traffic. It is inappropriate for the States to insist

that EPA should be assigned the burden of regulating motor vehicle traffic while at the same time insisting on their rights to increase that traffic by building new highways or devoting additional lanes of existing highways to commuter automobiles. The States, as the level of government which makes highway construction and operation decisions which may increase traffic, are properly assigned the responsibility to manage that traffic to reduce pollution.

Regulatory agencies routinely must regulate pollution sources where actions by large numbers of individuals contribute to the total pollution generated. However, the agencies are not limited to regulation of the individuals; rather they may impose responsibility on the source owner. For example, an integrated steel mill may contain thousands of workers individually or collectively operating a variety of polluting processes. The institution which owns the mill, however, is not exempt from regulation. A highway system fit for intensive use by motor vehicles is a sophisticated technological development which would not exist in the absence of a coordinating institution responsible for its construction and management.[18] If a private body were the highway owner and operator there is no doubt that regulatory agencies would properly impose pollution abatement duties on that body. Instead, the States have established themselves as the institutional owners of highways. However, this choice by the States to fill the essential role of highway owner and manager should not cause the federal government to lose its authority to impose duties on the owner of the source. As Intervenors have shown in their opening brief [19] the States have chosen to engage

[18] Prior to State construction and management of highways, the road "networks" were acknowledged to be of poor quality and not systematically laid out. See the brief history set forth in Brief for Petitioners-Intervenors at 19-25.

[19] Brief for Petitioners-Intervenors at 21-25.

in the activity of owning highways and they may choose to withdraw from this activity if they wish. See *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). However, while they remain the highway owners the States may not properly insist that the federal government's power to reduce air pollution from highways is confined to regulation of individual vehicles.

IV. EPA's Regulations Do Not Require States to Enact Laws and Adopt Regulations.

The States argue that EPA is directly coercing the States into passing legislation and adopting regulations. However, EPA has conceded that its regulations cannot require performance of such actions.[20] Accordingly, the States contention that EPA at one time took a different position is not relevant. The federal government's concession has eliminated any controversy which may have existed.

However, the States argue that they must legislate and adopt regulations simply to implement EPA's regulations. To the extent this assertion is correct, it does not render EPA's regulations unconstitutional. First, under the Clean Air Act and the Supremacy Clause, promulgation of substantive regulations by EPA under Section 110(c) of the Clean Air Act provides the States with legal authority to enforce those regulations against individuals.[21] Second, while in some instances appropriations legislation may be necessary to provide specific State agencies with the authority under State law to expend funds for particular programs, similar appropriations legislation might be equally necessary to permit a State

[20] See EPA Pet. No. 75-909 at 17 n.15 and Brief for the Federal Parties at 20 n.14, 54.

[21] See *Natural Resources Defense Council* v. *EPA*, 478 F.2d 875, 888 (1st Cir., 1973), Accord, *District of Columbia* v. *Train*, 521 F.2d 971, 984. (D.C. Cir. 1975).

agency to purchase pollution control equipment for a State incinerator or to purchase safety couplers for State railroad cars.[22] Such legislation is auxiliary or incidental to the discharge by the State of its duties to reduce its pollution.[23] If the duties are properly imposed they do not become constitutionally infirm because they require an assignment of State funds to particular agencies, which under State law may only be accomplished by a legislative act.

V. Recognizing the Responsibility of States for Highway Air Pollution is Necessary to Protect Individual Rights.

The States argue that EPA, not the States, should be required to carry out programs to reduce highway air pollution. They do not contend that they cannot reduce highway air pollution nor that EPA can reduce highway air pollution more effectively or more rapidly than the States could. Rather it is the States' position that they have the right to do nothing to reduce highway air pollution and that they intend to insist on this right regardless of the impacts on the health of their citizens. We do not believe that the States, as owners of the highways, have the right to do nothing.

When important human rights are in need of protection this Court has held States responsible for the harmful actions of private persons using State facilities and has refused to accept the argument that the State has

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[22] The States have conceded that EPA may impose the former duties and this Court in *National League of Cities* v. *Usery*, 96 S.Ct. 2465 (1976) explicitly reaffirmed the latter duty, first announced in *United States* v. *California*, 297 U.S. 175 (1936).

[23] *District of Columbia* v. *Train, supra*, n.21, 521 F.2d at 987. This Court recognized that a State agency might have to adopt regulations applicable to a private tenant of a State parking garage in order to discharge a State duty to provide equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 720, 725 (1961).

no duty to act affirmatively to prevent such harmful action. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). Like the individual rights protected in *Burton*, the right to a life free from suffering caused by air pollution is an important right. A person suffering from emphysema or lung cancer experiences a diminished life. We do not argue that the States have a constitutional obligation to prevent such a diminution of life by air pollution. Rather, we argue that the right to health is important enough that it outweighs on balance State claims of sovereign rights to do nothing in the face of threats to health caused by air pollution from highways which the States own and operate.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals for the Ninth and Fourth Circuits should be reversed and the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed insofar as it prohibits EPA from requiring a State to implement necessary transportation control measures, and affirmed in all other respects.

Respectfully submitted,

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